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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK GRANT, JR., EVELYN H. GRANT,
and all other persons similarly situated,
Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit give a mobile home lender the right to claim federal preemption of an established state maximum rate of finance charge on the financing of a mobile home without providing in its contract with the borrower the concomitant consumer benefits mandated by Congress in the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 and the Regulations promulgated thereunder?

2. Does the same opinion give a mobile home lender the right to claim federal preemption where the contract is contrary to the consumer benefits mandated by the same statute and regulations?

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OFFICIAL REPORTS OF OPINIONS BELOW

The panel opinion of the Eleventh Circuit Court of Appeals in *Grant v. General Electric Credit Corp.* is reported at 727 F.2d 1073 (11th Cir. 1984), and the en banc opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1404 (11th Cir. 1985) (en banc). The opinion of the United States District Court for the Southern District of Georgia dismissing petitioners' complaint for failure to state a claim is unreported.

The panel opinion of the Eleventh Circuit Court of Appeals in the similar action of *Quiller v. Barclays American/Credit, Inc.* is reported at 727 F.2d 1067 (11th Cir. 1984), and the *en banc* opinion of the Eleventh Circuit in said case is reported at 764 F.2d 1400 (11th Cir. 1985) (en banc).

Copies of all five of the aforesaid opinions are included in the Appendix of this Petition.

STATEMENT OF THE GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered on July 8, 1985 *en banc* by the United States Court of Appeals for the Eleventh Circuit.

The within Petition for Writ of Certiorari is presented within ninety days pursuant to 28 U.S.C. § 2101(c), and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Depository Institutions Deregulations and Monetary Control Act of 1980, 94 Stat. 161

OCGA § 10-1-33(a)

OCGA § 10-1-38(b)(c)

45 Fed. Reg. 31122 (May 12, 1980)

45 Fed. Reg. 43681, 43682 (June 30, 1980)

12 C.F.R. § 590.4

These statutes and regulations are set forth as Appendix F to this petition.

STATEMENT OF THE CASE

The within case commenced on March 25, 1983, in the United States District Court for the Southern District of Georgia with the filing of a class action complaint (R. 1) by Jack Grant, Jr. and Evelyn H. Grant (hereinafter petitioners) on behalf of themselves and all other persons similarly situated against General

Electric Credit Corporation (hereinafter respondent). The basis for federal jurisdiction in said Court was 28 U.S.C. § 1332 in that the petitioners and all other persons similarly situated and respondent were citizens of different states and the matter in controversy exceeded the sum of $10,000.00.

In response to said complaint, respondent filed a F.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim in lieu of an answer (R. 26). Before any discovery at all had taken place, the District Court conducted a hearing on the motion to dismiss and granted same (R. 139). Therefore, the only facts before the District Court were the contentions of the petitioners in their complaint, which, at this juncture, must be taken at face value. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-516, 30 L.Ed2d 642 (1972).

Accordingly, the following facts are taken from the complaint. On February 23, 1982, the petitioners purchased a new 1982 Redman, Eaton Park mobile home from Hutchinson Homes, Inc. (R. 4). The retail installment sales contract utilized to finance the purchase of said mobile home was a form prepared by respondent; it was anticipated that the said financing contract would be assigned from Hutchinson Homes, Inc. to respondent; and this assignment was in fact accomplished shortly after the contract was entered into by the petitioners and Hutchinson Homes, Inc. (R. 4).

At the time petitioners entered into the retail installment contract assigned to respondent, the maximum finance charge under Georgia law which respondent could exact from petitioners to finance their mobile home was a 10% add-on rate. O.C.G.A. § 10-1-33. However, the finance charge actually assessed by respondent exceeded an add-on rate of 13.6%, resulting in respondent's obtaining an additional $9,996.99 in finance charges to which it was not entitled under Georgia law. For this violation of Georgia law by respondent, petitioners sought a declaration that the respondent was barred from collecting any finance charge from petitioners and all other persons similarly situated. O.C.G.A. § 10-1-38(b). In the event that respondent's

violation was found by the Court to be willful, petitioners also prayed on behalf of themselves and all other persons similarly situated for recovery of double the time price differential (finance charge). O.C.G.A. § 10-1-38(c).

Anticipating that respondent would take the position that it was entitled to a higher rate of finance charge than that allowed by Georgia law by virtue of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (hereinafter Preemption Act) and Regulations (12 C.F.R. § 590.4) promulgated thereunder, petitioners set forth in their complaint that respondent had failed to provide in its contract with the petitioners and all those similarly situated the consumer benefits mandated by Congress in the Preemption Act and 12 C.F.R. § 590.4; and that, thus, the rate of finance charge was governed by Georgia law and had not been federally preempted. As such, respondent was not entitled to collect a higher rate of finance charge and by doing so, had violated Georgia law.

The particular portion of respondent's contract which petitioners contended contained provisions which were inconsistent with and contrary to the Preemption Act and 12 C.R.F. § 590.4 was as follows:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

Petitioners alleged that the above-quoted portion of respondent's contract utterly failed to comply with the Preemption Act § 501(c)(2) and 12 C.F.R. § 590.4(h), thus denying respondent the privilege of federally preempting the Georgia maximum rate of finance charge, because:

1. Respondent's contract allowed respondent *immediately* to declare the entire contract amount due and payable upon petitioners' default by as little as one day in making payment when due.

2. Respondent's contract allowed respondent to accelerate and make immediately due and payable the entire principal balance of the contract less any unearned portion of the finance charge.

3. Respondent's contract gave unclear, indefinite and misleading information that the Petitioners and those similarly situated would be given an undefined notice of a right to cure prior to acceleration.

4. The "terms and conditions" of respondent's contract did not provide for a 30-day notice prior to repossession or foreclosure and were, in fact, contrary thereto.

As pointed out, the District Court ruled upon a F.R.C.P. 12(b)(6) motion that petitioners' class action complaint failed to state a claim as Georgia's maximum rate of finance charge had been federally preempted. The District Court's order was appealed by petitioners to the Eleventh Circuit Court of Appeals, a panel of which reversed the District Court, holding that Georgia state law had not been preempted due to respondent's contract being inconsistent with the Preemption Act and Regulations. *Grant v. General Electric Credit Corporation*, 727 F.2d 1073 (11th Cir. 1984).

On rehearing *en banc*, the panel opinion was reversed, and the District Court's order was affirmed. *Grant v. General Electric Credit Corporation*, 764 F.2d 1404 (11th Cir. 1985) (en banc). It is from this *en banc* opinion of the Eleventh Circuit that this Petition emanates.

ARGUMENT

Introduction

Before amplifying the reasons relied upon by petitioners for allowance of the writ of certiorari, petitioners would re-

spectfully submit that it is very important to recognize at the outset the

> history of abuse associated with mobile home lending. In large part, these abuses have resulted from the fact that mobile homes are usually financed under motor vehicle and retail installment sale laws, which allow lending practices that are not appropriate for loans as large as that required in a mobile home sale. As personalty, mobile homes have been also subject to summary repossessions in the event of default.

FHLBB General Counsel Op. No. 1981-2, Fed. Banking L.Rep. (CCH) 83,002 (July 28, 1981). Moreover, as a group, mobile home credit buyers are more vulnerable than the average homeowner because they are poorer and less well educated. U.S. Dept. of Commerce, Bureau of the Census, *Annual Housing Survey, Part A*, (1974).

Mobile home credit buying is dominated by poorer families. In 1980, 400,000 families were mobile homeowners with incomes below the poverty line. U.S. Dept. of Commerce, Bureau of the Census, *U.S. Metropolitan Housing Characteristics*, Table A-8 (1983). Fully 35% of mobile homeowners have incomes under $10,000.00. *Ibid.* About 25% of mobile homeowners are senior citizens, and young married couples comprise another 25%, FTC, *Staff Report on Mobile Home Sales & Service* at 37-39 (1979). More than for homeowners overall, 21% of mobile homeowners have less than a sixth grade education, and over half the mobile homes are located outside of metropolitan areas, *id.*, where there is frequently less access to consumer education and legal assistance.

When high finance charge rates are used to finance mobile home purchases (as when state limits are preempted) the debt is harder to manage and families are more likely to become overextended. The frequency of delinquency increases, and with it the occasion for collection abuses. When mobile homeowners are late in making a payment, it is often for reasons beyond their control. Like other consumer borrowers, lapses of

income from unemployment, uninsured or underinsured illness or injury, divorce, termination or reduction in pensions or other benefits, and unmanageable expenses like heating bills cannot be avoided, as the FTC found. FTC, *Credit Practices Rule Statement of Basis and Purpose and Regulatory Anaylsis*, 49 Fed. Reg. 7740, 7744, note 27 (1984).

Because of these disadvantages, mobile homeowners are disproportionately victims: they are easier to overawe, less able to understand or defend their rights and easier to intimidate. As the Presiding Officer in the FTC hearings on mobile homes summarized it:

> It is also clear that consumers purchasing mobile homes rely entirely on the expertise of both the dealer and the manufacturer to handle the sometimes complicated deals of the entire transaction.

FTC, *Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales & Services*, at 31 (1979). They were also found to be less able to afford lawyers to discern their rights or to seek legal advice. *Id.* at 31, 38.

Congress undoubtedly had these factors in mind when it passed the Preemption Act and required certain consumer benefits to be in the contract in order to preclude overreaching by the creditor if higher rates were to be charged. H. Conf. Rep. No. 96-84 , 96th Cong., 2d Sess. 79, *reprinted in* 1980 U. S. Code Cong. & Ad. News 298, 309. These benefits are especially critical when a person's home is at risk.

Abusive bill collecting practices are much more likely to occur when they are not addressed in the written contract. For example, in the case of *Moyer, et al v. Citicorp Homeowners, Inc. and Citicorp Acceptance Co., Inc.*, District Court No. CV183-93, wherein discovery was allowed, the District Court, after an evidentiary hearing, held that:

> Here we have a situation where the lender [Citicorp] has gone somewhat further than a situation where it has merely attempted to utilize contractual provisions which

are contrary to the statute and regulations. We have a situation where the lender through its agents and operatives have gone even beyond the contract and demanded immediate possession and taken action by telephone to repossess and to foreclose.

Now it could be said that these are merely threats, promises, or statements which are hollow because they are contrary to the statute, and once a debtor gets to his lawyer, his lawyer will obviously advise the creditor that they simply can't do that.

However, . . . not every contract gets to litigation. It is inappropriate to assume that, and that I believe is exactly what the Quiller majority observed in the panel opinion.

I observed, as I recall that in the hinterland of Georgia or South Carolina there may be a State Court Judge or a lawyer steeped in local or state practice who is not familiar with the Code of Federal Regulations or 12 United States Code Section 1735(f)-7, and those persons reading the simple terms of a contract might be misled, not just the debtor but the lawyer and Judge could even be misled by the terms of the contract. Then, going back again to the other observation, it's not a fact that every one of these situations will end up in foreclosure.

The Kerleys and McAffees are two object lessons in that regard. It appears quite clear from the evidence available that they left on the strength of the threats. They wanted to get their household belongings. There were threats that were made that not only would the trailer be seized, but household possessions would be seized, "the axles and trucks were on the way for that purpose." So here we have not only threats, but we can only consider a telephone call by a person who is employed, armed and engined for purpose of making telephone calls, the act of an agent authorized and taken at the instance of and for the purpose of, for the use and benefit and on behalf of the lender.

Transcript of hearing before the United States District Court for the Southern District of Georgia on July 9, 1984 in *Moyer, et al. v. Citicorp, et al.*, File No. CV183-93 at pages 17-20 [attached as an addendum to petitioners' reply brief en banc in the Eleventh Circuit in the case at bar].

The Fifth Circuit recognized this same problem in *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) and said the relevant question was not how a court would interpret a contract without necessary consumer safeguards but how the borrower behaves in the actual world of commerce:

> We must also ask whether the lender might be able to employ certain provisions of the contract to exact illegal charges from unsuspecting debtors. It is naive to assume that every controversy culminates in litigation. The [statutory] policies require us to consider the actual operation of the contract in the commercial world.

Id. at 993. *Accord, Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984) *aff'd on rehearing* 764 F.2d 1400 (11th Cir. 1985) (en banc). *Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985) (to determine whether the Fair Debt Collection Practices Act has been violated, the court is obligated to decide whether least sophisticated consumer would be deceived, mislead, or harassed by creditor's actions).

Against this backdrop, the reasons for granting of a writ of certiorari will now be examined.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN ITS OPINION IN *GRANT V. GENERAL ELECTRIC CREDIT CORPORATION*, 764 F.2d 1404 (11th Cir. 1985) (en banc) HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The instant action is only one of five class action cases which were filed in the United States District Court for the Southern

District of Georgia. The District Court dismissed the petitioners' complaint in the case at bar for failure to state a claim, holding that the Georgia maximum finance charge had been preempted. A panel of the Eleventh Circuit reversed, 727 F.2d 1073, but the Court of Appeals *en banc* affirmed, 764 F.2d 1404. In *Quiller v. Barclays American/Credit, Inc.*, the District Court dismissed the class action complaint on the same basis, and this holding was reversed by the Eleventh Circuit Court of Appeals *en banc*, finding that the Georgia maximum finance rate had not been preempted by Barclays form contract. 764 F.2d 1400. The same District Court in the class action cases of *Moyer, et al. v. Citicorp Homeowners, Inc. and Citicorp Acceptance Co., Inc.*, District Court No. CV183-93; *Doyle v. Southern Guaranty Corporation*, District Court No. CV184-180; and *Wood v. Fort Wayne Mortgage Company*, District Court No. CV 184-204 has granted summary judgments to the plaintiffs or denied defense motions to dismiss, holding that the Georgia maximum finance charge had not been preempted by the respective lenders because their contracts contained provisions inconsistent with and contrary to congressionally mandated consumer benefits. These latter three cases are now all pending in the United States Court of Appeals for the Eleventh Circuit. The total number of families involved in these five cases is approximately 7,500. (Total finance charges in Georgia alone are approximately one quarter of a billion dollars, and the finance charges in excess of that allowed by Georgia law which these families are paying are approximately $100,000,000.00).

Petitioners respectfully submit that there is a conflict in the *en banc* opinions rendered by the United States Court of Appeals in *Grant* and *Quiller* and that this novel and important question of federal law pertaining to the effect and construction of the Preemption Act and 12 CFR § 590.4 should be finally settled by this Court so that the respective rights and responsibilities of mobile home borrowers and lenders in all the States can be clarified and finally resolved.

It is the position of petitioners that the Court of Appeals, in a totally result-oriented opinion, has completely ignored the in-

tent and purpose of Congress in the passage of the Preemption Act. Congress did not take the unprecedented step of preempting two centuries of states' control over their own interest and finance charge rate structures without intending to assure that the citizens of the respective states would receive certain consumer benefits in the "terms and conditions" of the financing contracts. Senator Morgan stated, in opposition to the preemption provisions:

> [T]his bill would seek to preempt the long-standing authority of States which are in a superior position to deal with situations unique to their respective regions, and would impose national usury norms which would, in the long run, be less responsive and less appropriate for States than would measures designed by their respective legislatures.

S.Rep, No. 96-368, Oct. 15, 1979, at 41, *reprinted in* 1980 U. S. Code Cong. & Admin. News 236, 277.

Such federal interference with the public welfare authority of the states was an extraordinary step, perhaps justified by the situation. So the extraordinary lender benefit of unfettered interest and finance charge rate selection was balanced by preconditions. Effort was made to avoid sacrificing important state law protections and the unreasonable loss of vulnerable consumers' homes. In order to give protection to borrowers against the predictable abuses of unlimited rate lending, interest rate preemption was conditioned on a series of minimum consumer protections plus deference to more protective state laws generally. H. Cong. Rep. No. 96-842, 96th Cong., 2nd Sess. 79, *reprinted in* 1980 U. S. Code. Cong. & Admin. News 298, 308.

In the congressional plan, mobile home lenders were given a choice—they could provide the mandated consumer benefits and preempt State established rates or they could forego providing the benefits and charge the rate set by the respective states. As is all too typical in contracts of adhesion, the respondent herein drafted its contract, charged the higher rate,

and did not include therein the notice to the debtor that he had a right to a 30-day notice prior to the lender's instituting any action leading to repossession or foreclosure. The contract even allowed lender conduct expressly prohibited by the FHLBB regulations in a preemption contract.

The *en banc* opinion of the United States Court of Appeals improperly allows a lender to draft its financing contract in such a way that the debtor will have absolutely no idea of his right to such a notice and leaves the debtor to the caprices of the lender, and this was not the intent of Congress. 45 Fed. Reg. 31122 (May 12, 1980) stated that "state usury ceilings may be exceeded by a lender covered by the Act *only if the loan complies with such regulations.*" (Emphasis added). Additionally, 45 Fed. Reg. 43681 (June 30, 1980) provided that "[t]he rules prescribe *consumer protections which must be included in loans* secured by first liens on mobile homes before such loans are eligible for the state usury law exemption . . ." (Emphasis supplied). It could not be any clearer that the benefits, including the right to the 30 day notice, were to be included in the loan documents themselves.

It is this particular benefit of 30 day notice before acceleration, repossession or foreclosure to which this petition is addressed.

A. Comparison of the Georgia Motor Vehicle Sales Finance Act and the Preemption Act.

Mobile home sales in Georgia are governed by the Georgia Motor Vehicle Sales Finance Act (Georgia Act). *Smith v. Society National Bank*, 141 Ga. App. 19, 20, 232 SE2d 367 (1977); *Pike v. Universal CIT Credit Corporation*, 125 Ga. App. 83, 84, 186 SE2d 482 (1971).

The Georgia Act provides a permissible finance charge on a new mobile home of $10.00 per $100.00 per year. OCGA § 10-1-33(a). This is known as "add-on rate."

For a violation of the Georgia Act, the minimum relief to which a plaintiff would be entitled is to preclude the lender from collecting any finance charges in the transaction.

> A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

OCGA § 10-1-38(b). *If* it should be found that a violation was willful, then the borrower is entitled to recover double the time price differential charged in the transaction. OCGA § 10-1-38(c).

Such statutory rights are not uncommon for violations of finance charge or interest limits. For example, the National Bank Act, 12 U.S.C. § 86, imposes a loss of all unpaid interest where the contracted interest exceeds permissible limits, and twice the amount of any interest actually paid under an usurious loan.

It is next necessary to review the provisions of the Preemption Act. The respondent stressed below that the Preemption Act was passed to ease a credit crunch during the time of unusually high interest rates. However, it was clear from the very beginning that the removal of interest and finance charge ceilings was not the only consideration where the financing of mobile homes was concerned.

> A second qualification is that, in order for the preemption to extend to the rates for mobile home loans, the statute and regulations require creditors to honor certain consumer protections for the customers in those transactions. There is a trade-off of rate relief for consumer protections in those mobile homes transactions.

Burke, *Federal Preemption of State Usury Laws*, The Business Lawyer, Vol. 37, p. 747, 749 (1981 ABA Annual Meeting Program). Thus, in connection with the financing of mobile homes, Congress specifically provided that state law would not be preempted *unless* the "*terms and conditions*" relating to such "credit sale" specifically gave the borrower certain benefits that would not be available under state law. Preemption Act § 501 (c).

Accordingly, for a mobile home installment sale made in the state of Georgia, a lender, if it wished to be relieved of the

restrictions on finance charges imposed by Georgia law, would have to give a retail buyer or borrower the following additional benefits:

1. Restrictions on acceleration, repossession and foreclosure. Under the federal scheme, the lender has no right to act to repossess or to foreclose, or to accelerate payments of the entire outstanding balance of an obligation against a debtor until 30 days after the creditor sends the debtor a specified notice of default and the right to cure default. 12 C.F.R. § 590.4(h). This right to a 30-day notice or 30-day grace period also has to be a *term and condition* of the contract. Preemption Act, Title V, § 501(c)(2). (*The respondent did not provide this benefit in its contract; and, in fact, its contract is inconsistent with and contrary to this benefit*). There is no similar provision in Georgia law.

2. Restrictions on prepayment penalties. (The respondent provided this benefit in its contract even though petitioners alleged below that it was not in the proper type size). Preemption Act, Title V, § 501(c)(1), 12 C.F.R. § 590.4(d). The right to prepay is also given under the Georgia Act, however, there is a $25.00 acquisition charge which could be considered as a prepayment penalty. OCGA §§ 10-1-33(b), 10-1-34.

Also, the Preemption Act and Regulations restricted the method of calculating refunds of finance charges, granted a 15 day grace period before the lender could impose late charges, restricted balloon payments and deferral fees, all more favorable to the borrower than under Georgia law. *Compare with* OCGA §§ 10-1-32 (g) and 10-1-34.

Congress had great concern about preempting state law relating to finance charges that could be assessed on the purchase of mobile homes or manufactured homes. One year before the Preemption Act was passed, Congress relieved lenders of all restrictions on interest rates and finance charges in connection with the financing of conventional home mortgages. 12 U.S.C. § 1735f-7. Mobile home financing was treated differently in that Congress placed added restrictions upon len-

ders and credit sellers not required for conventional residential financing, obviously for the reasons set forth in the Introduction of this Petition. Preemption of interest rates for mobile homes was conditioned upon specific consumer protection benefits. *See*, H. Conf. Rep. No. 96-842; Burke, *Federal Preemption of State Usury Laws*, *supra*.

Those benefits are either set forth in the statute itself or in the regulations promulgated by the Federal Home Loan Bank Board under authority given in the Preemption Act. The retail seller or ultimate lender cannot choose to accept the advantage of an unlimited finance charge and not give the borrower or debtor those consumer benefits required by the Preemption Act and 12 C.F.R. § 590.4. In the case at hand, the lender had to comply fully with either the Preemption Act or with state law; the choice was that of the lender. Preemption Act § 501(c).

B. The Requirements of the Preemption Act Were Not Met by Respondent in its Contract and the Court of Appeals was incorrect in holding otherwise.

The critical language from § 501(c) of the Preemption Act is as follows:

> The provisions of sub-section (a)(1) [preemption of state limits on interest and finance charges] *shall not apply* to a loan [or] credit sale . . . *unless the terms and conditions* relating to such loan [or] credit sale . . . *comply with the consumer protection provisions specified in regulations* prescribed by the Federal Home Loan Bank Board. *Such regulations shall—*
>
> > (2) *require a 30-day notice prior to instituting any action* leading to *repossession or foreclosure* . . .
> >
> > . . (4) *include such other provisions as the FHLBB may prescribe* . . . .

(Emphasis supplied).

Respondent's contract violates the Preemption Act and 12 C.F.R. § 590.4 in at least four respects pertinent to this Petition, all of which deficiencies were improperly given judicial

sanction by the Court of Appeals in its *en banc* opinion. This directly contravened the intent and purpose of Congress to the benefit of mobile home lenders and to the detriment of the mobile home buying public and the respective states' rights to protect their citizens from unlawfully high finance charges. Each of these deficiencies is now examined in greater detail.

1. *Failure to Comply with the 30 Day Notice Prior to Acceleration.* There can be no dispute but that the Preemption Act requires the "terms and conditions" of the credit sale to comply with 12 C.F.R. § 590.4. Failure to do so deprives the lender of federal preemption of state limits on interest and finance charges. Preemption Act § 501(c).

The next step is simply to compare the contract with the regulations. 12 C.F.R. § 590.4(h) very clearly states "that no action . . . to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default. . ."

When respondent's contract is examined in light of these requirements, is is plainly invalid. Under the heading "Late Payment, Default and Default Charges," the contract states as follows:

> In the event of Buyer's *default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder*, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

(Emphasis added). Respondent very simply reserved for itself the right to declare the contract immediately due. The regulations state that 30-days' notice must be given before a lender or seller may take such action. The only exceptions would be "extreme circumstances" such as abandonment of a home, or a

debtor in default for the third time in one year. 12 CFR § 590.4(h). These are not mentioned in the form contract which plainly triggers default by mere late payment. Thus, respondent has used a contract with "terms and conditions" that do not comply with the FHLBB regulations.

Respondent defended its contract in the lower courts by reference to the language that appears later and states: "provided that Buyer shall be given notice of right to cure default." But does this language correct the deficiency? The answer is no.

What is contained in the respondent's contract is an absolute contradiction. The contract states that payment shall be due on the eighth day of each month. If the buyer misses that payment "when due," the contract says that the entire balance then becomes immediately due and payable at the option of the Seller. On the other hand, respondent has plugged in a vague and unspecified reference two lines later to a "notice of right to cure." If there is such a right to prior notice, then is it in fact possible for the lender to make the entire balance "immediately due" if the purchaser fails to make a payment "when due?"

When the purchaser searches his contract to see what this "notice of right to cure" is, he will find nothing. There is no mention of or reference to the Preemption Act. Under Georgia law, unless the contract spells out such a right on the part of the purchaser, there is no entitlement to any such notice. *See*, O.C.G.A. § 11-9-503; *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 SE2d 295 (1978); *Ford Motor Credit Co. v. Milline*, 137 Ga. App. 585, 588, 591, 224 SE2d 437 (1976); *Borochoff Properties, Inc. v. Howard Lumber Company*, 115 Ga. App. 691, 696, 155 SE2d 651 (1967).

The Court of Appeals completely ignored how the contract would operate under controlling Georgia authority by stating that the issue was not "what Georgia requires, but what the federal preemption scheme requires." 764 F.2d at 1408. The fallacy of this conclusion is readily apparent when it is considered that a creditor seeking to repossess must resort to

Georgia courts or to diversity jurisdiction of Federal courts which will be governed by Georgia law. Courts might or might not be familiar with the "federal preemption scheme," and even when they are, there is nothing in the contract to invoke a 30 day grace period for the debtor. The result is that peoples' homes could be lost. The panel opinion in *Quiller*, 727 F.2d 1067, 1071, *aff'd en banc* 764 F.2d 1400 specifically recognizes this problem, but the Grant *en banc* opinion described the contract reference to notice as "unambiguous" and cavalierly assumes that a creditor will do the right thing. That is not the reality of the marketplace. *See* excerpt from the United States District Court for the Southern District of Georgia in *Moyer*, *supra*, at 7-9.

To the average reader, the proviso relied upon by the respondent would most likely refer to the calculation of the refund of the unearned portion of the finance charge. The clause concerning refund of the finance charge is separated from the remainder of the sentence by a comma and the language concerning right to cure default is likewise included in that separated portion. At page 7 of its petition for rehearing before the Court of Appeals, respondent cited *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service*, 400 F.2d 465 (5th Cir. 1968), for the proposition that a proviso "must be construed as a limitation on the language preceding it." That is just the problem here. The preceding language has to do with refund of the finance charge, and no reasonable construction of the sentence would tie the right to notice (whatever it is) to the lender's right to *immediately* declare the debt due.

The panel opinion correctly acknowledged that the right of immediate acceleration is "directly contrary to the statute and . . . the regulations . . ." 727 F.2d at 1075. The panel characterized the qualifying clause relied on by GECC as transmitting a conflicting message to that previously given concerning immediate acceleration. *Id.* The *en banc* court declined to follow this reasoning. 764 F.2d 1404 at 1406-1407. Nevertheless, the defect is actually worse than stated by the panel. The panel surmised that a borrower might be aware of the

Preemption Act and have some knowledge of the contradiction between what is required by the statute and regulations and what is expressed in the contract. However, as previously noted, the law in Georgia gives no implied right to notice of cure and none is stated elsewhere in the contract. Moreover, the contract does not state or indicate in any fashion that it is subject to or incorporates the Preemption Act or the regulations. Thus the words "notice of right to cure" sit there with no definition, with no reference to any body of law, and in contradiction to the express language that the lender has the right of immediate acceleration.

This defect in the respondent's contract is not a mere technicality or a matter of idle academic interest. It is the type of overreaching which greatly affects the financial welfare of consumers. Faced with the prospect of having the contract immediately accelerated, the purchaser may opt for bankruptcy relief, may have to sell other property at distress prices in order to try and protect his home, may surrender the home, or may be forced by agents of lenders into making payments sooner or in greater amounts than those required by the Preemption Act or Georgia law. The *en banc* opinion, if allowed to stand, will authorize unscrupulous lenders to create just such situations, which was exactly what Congress was attempting to prohibit.

If the lender is left with the option to enforce unlawful terms, "[the consumer's] recourse is now based solely on the willingness of the drafting party . . . The discretion of the organization has taken the place of rights enforceable by law." Rakoff, *Contracts of Adhesion*, 96 Harv. L. Rev. 1193, 1228 (1983). (The dissent in *Grant en banc* aptly points out the realities of what can occur with provisions such as those contained in the petitioners' contract, 764 F.2d at 1409-1411, as does the District Court's opinion in *Moyer, supra*).

2. *Right to Acceleration of the Entire Balance is Contrary to the Regulations.* In its contract, respondent retains for itself the right to declare due and payable "all installments due or to

become due hereunder, less the unearned portion of the finance charge." This is contrary to the following portion of the regulations:

> In the case of default on payments, the sum stated in the notice may *only include payments in default and applicable late or deferral charges.* If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

(Emphasis added). 12 C.F.R. § 590.4(h).

Thus, the contract provision allowing respondent to accelerate the entire balance is as contrary to the purchaser's protection in the regulations as any wording could be. If the lender wants to receive the benefit of unlimited interest rates or finance charges under the federal act, it *must* use a contract that conforms to the consumer protection benefits in the regulations. Preemption Act § 501(c); 45 Fed. Reg. 31122 (May 12, 1980); 45 Fed. Reg. 43681 (June 30, 1980). In the respondent's contract, the debtor is subject to having the entire balance become due when he misses a payment by as little as one day, but the regulations give a lender only the right to require that the past due installments and late charges have to be paid.

The *Grant en banc* court attempts to get around this deficiency by stating "[t]here is no allegation that [respondent] sent a notice of default contrary to that of 12 C.F.R. § 590.4." 764 F.2d at 1407. This conclusion is wrong in at least two important respects. One, Congress did not intend for preemption to be governed by subsequent *conduct* of the lender but by the "terms and conditions" of the loan at the time of contracting; and, two, the complaint was dismissed on a FRCP 12(b)(6) motion before any discovery was allowed. If what the Eleventh Circuit *en banc* court says is correct, a lender can improperly threaten a consumer with having to pay the *entire debt* because that is what the contract provides and the con-

sumer has no right to relief. *That is absolutely not what Congress intended.*

3. *Inadequate and Misleading Information is Given Concerning the Right to Cure.* As argued *supra*, the language concerning "notice of right to cure default" will not remedy the flaws that respondent has built into its form contract, i.e., immediate acceleration, and acceleration of the entire balance. Even if one does make that argument, as respondent has attempted to do, it would only show another instance in which the contract provisions do not comply with the regulations.

12 C.F.R. § 590.4(h) not only requires that a debtor be given 30 days notice before the lender accelerates the entire balance, but the debtor is also given the right to cure any default for 30 days. Notice of this right must be given to the debtor. Measured by these requirements, the respondent's form contract does not comply.

The contract form makes only a reference to an undefined "notice of right to cure." As pointed out above, unless the federal regulations are incorporated by reference, or unless the right to cure is given some definition in the contract, under controlling Georgia law, the debtor has no such right.

Moreover, after reading respondent's contract, how will the buyer know whether the notice will come 30 days in advance of the seller's action against him, one week in advance, or fifteen days? Other pertinent dates in the contract are specifically set forth. Under the heading "Property Insurance," there is a 10 day notice of cancellation provisions. Under the "Late Payment" provision, there is a 15 day limit before delinquency charges are imposed. Under the "Additional Terms and Conditions" on the back of the document, there is a 10 day period within which the buyer must make demand for the return of items on which the seller does not have a security interest. However, on this crucial matter of notice which respondent argues is given by its form contract in terms sufficient to earn preemption the buyer is left, at best, to guess as to what notice he will receive.

The most likely reading by a consumer debtor would lead to the understanding that there is nothing that he can do to prevent acceleration and other creditor remedies upon default. Once the debtor reads about default in payment "*when due*" and the seller's right to "*immediately*" act against him, it is likely that the subsequent language about "notice of right to cure" would be meaningless. If it has any meaning to the debtor, he will most likely consider it to refer to the calculation of the unearned portion of the finance charge, which is the clause, separated by a comma from the first part of the sentence, that the "notice of right to cure" appears to modify.

In sum, petitioners submit that there is no reasonable construction of this contract that can conform these onerous provisions to the consumer protection benefits in the regulations. That being the case, the terms and conditions of the contract are contrary to the regulations, and the creditor was not entitled to charge finance charges in excess of Georgia law.

4. *The Terms and Conditions of the Contract Fail to Disclose at All the Right to Notice Prior to Repossession or Foreclosure.*

It must be remembered that the 30 days' notice referred to at this point is grounded in the statute and not in the regulations. Previously in this Petition, the regulatory requirement found at 12 C.F.R. § 590.4(h) for notice prior to *acceleration* has been discussed. The question now is whether the statute imposes an independent requirement that notice prior to *foreclosure or repossession* be contained in the terms and conditions of the contract itself.

The Preemption Act requires the "terms and conditions" of the contract to be in compliance with the regulations. The Act then goes on to specify that the Board "regulations shall . . . (2) require a 30 day notice prior to instituting any action leading to *repossession or foreclosure* . . ." (Emphasis added). The question becomes: how can the terms and conditions comply with this requirement without incorporating the 30 days notice language into the contract between the parties? It cannot be done, and this fact is clearly pointed out in the comments of the Board

prior to the final promulgation of 12 C.F.R. § 590.4. 45 Fed. Reg. 31122 (May 12, 1980) ("state usury ceilings may be exceeded by a lender covered by the Act only if the loan complies with such regulations"); 45 Fed. Reg. 43681 (June 30, 1980) ("the rules prescribe consumer protections which must be included in loans").

By requiring that the terms and conditions of a preempted contract shall comply with the regulations which must include a 30 day notice provision, Congress has obviously signalled its intent that borrowers receive 30 days' notice before the collateral can be repossessed or foreclosed; and in the state of Georgia, unless such a right is expressly included in the contract, the right does not exist.

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

OCGA § 11-9-503. *Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 SE2d 295 (1978) confirms that the contract must contain a specific provision to the contrary, or else the creditor can repossess without notice. If the creditor wishes to use judicial process, it may still repossess on 7 days' notice. OCGA § 44-14-230, 232 (b).

If respondent were to file suit in a Georgia court to enforce its contract right of repossession, and the sole defense of the borrower is that it was not given a 30 day notice to cure default, what would be the outcome? Georgia courts would apply the parole evidence rule, OCGA § 24-6-1, as well as the above cases holding that there is no implied right of notice prior to foreclosure or repossession, and enter judgment in favor of the lender. The consumer protection benefit which Congress obviously required as a condition of preemption would be illusory. The *en banc* opinion in *Grant* has just this effect.

The *en banc* court recognized that the GECC contract is silent concerning notice prior to foreclosure or repossession.

764 F.2d at 1407. It adopted the panel opinion in *Quiller* as authority that a contrct may be silent in regard to this consumer benefit and still be entitled to preemption. The *Quiller* opinion discusses this point at 727 F.2d at 1070-71.

The *Quiller* opinion ignored the fact that a contract "silent" in regard to notice prior to repossession or foreclosure is a contract in Georgia which allows immediate self-help repossession or judicial foreclosure upon seven days' notice. The *Grant en banc* opinion recognizes the problem, but blithely opined that "there is no allegation that GECC *conducted* its business in such a manner." (Emphasis added). The fallacy here is the Court's failure to follow the requirement of Congress in § 501(c) that the "terms and conditions" of a contract be in compliance with the law. *See, also*, 45 Fed.Reg. 31122 (May 12, 1980), and 45 Fed.Reg. 43681 (June 30, 1980) where the FHLBB acknowledged that the contract document itself must be in compliance with the law.

Respondent had a choice. It could have contracted for a finance charge in compliance with Georgia law—approximately 14½% simple interest on a fifteen year contract (10% add-on). To go above that rate, its form contract had to "comply with terms and conditions" of federal law. Many mobile home lenders drafted their contracts with straightforward language consistent with the Act and FHLBB regulations. Why GECC did not cannot be determined on the present record. Unless the statute passed by Congress is to be ignored, the GECC form document is not sufficient to preempt state law in Georgia.

C. Sound Policy Dictates Strict Compliance With the Preemption Act.

The respondent's form is a prototype contract of adhesion. It has all of the characteristics and was generally entered into under all of the circumstances that typically characterize these one-sided legal instruments. Rakoff, *Contracts of Adhesion*, 96 Harv. L. Rev. 1174, 1177 (1983). Such instruments are intended by the draftsmen to be exactly that way.

> We have seen that the dynamics of the use of the standard form contracts tend to encourage draftsmen to write terms that are more favorable to the business firm than is its own practice. Unconstrained by the considerations of customer goodwill and satisfaction that help to police business practice but not invisible terms, the draftsman tries to insulate business practice from legal oversight.

Id. at 1275.

The drafting and use of such forms is undertaken against a backdrop of consumer ignorance.

> [T]he adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion . . .

Id. at 1179.

Turning to the case at hand, it is readily apparent that the issue is not de minimus. Under the Georgia Act, the maximum lawful finance charge would have been $47,579.04. Instead, respondent has imposed a finance charge of $57,546.00. This exceeds by almost $10,000.00 the amount which was lawful under Georgia law. Thus, it easily can be seen that mobile home lenders are collecting millions of dollars in finance charges beyond what state law would permit. For this not insignificant benefit, Congress clearly intended to protect the borrowers. The opinion of the Eleventh Circuit *en banc* in *Grant*, if not reviewed and corrected, will allow lenders to be unjustly enriched at the expense of mobile home borrowers who have not and will not receive the consumer benefits required by Congress.

CONCLUSION

Congress was specific in its instructions to lenders who desired to collect interest or finance charges greater than allowed by state law. In the Preemption Act, Congress was unmistakable in its warning that preemption would not apply "unless the terms and conditions relating to such loan . . . comply with consumer protection provisions specified in regulations prescribed" by the FHLBB. Preemption Act § 501(c). There are at least four instances in the respondent's contract where it conflicts with or does not comply with the statute or with the regulations. Any one of these is sufficient to deprive respondent of the conditional preemption.

The existence of these terms and conditions places the retail sales contracts between respondent and the petitioners and those similarly situated back under the Georgia Act. There, it is plain that an excessive finance charge has been imposed. Thus, the cause of action is properly stated, and it was error for the District Court to dismiss the complaint and for the Eleventh Circuit Court of Appeals *en banc* to affirm.

For the reasons set forth in the within Petition, writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

JACK GRANT, JR., EVELYN H. GRANT, and
all other persons similarly situated,
Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Defendant-Appellee

No. 83-8456.

United States Court of Appeals,
Eleventh Circuit.

July 8, 1985.

[Reported at 764 F.2d at 1404 (1985)]

Appeal from the United States District
Court for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK*, Circuit Judges.

PER CURIAM:

This is the second of two cases taken *en banc* to determine whether the mobile home financing contracts involved satisfy certain conditions imposed by federal law that would entitle the contracts to be exempt from state law interest ceilings. By meeting the requirements of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C.A. § 1735f-7 note) (the "Act") and the regulations promulgated thereunder by the Federal Home Loan Bank Board (FHLBB), *see* 12 C.F.R. § 590.4, certain financing agreements

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*Circuit Judge Thomas A. Clark, recused himself and did not participate in this decision.

preempt state law interest ceilings, thereby enabling creditors to charge a rate of interest in excess of state law limits.

In the other case, a panel of this Court had held that, although a contract need not contain express terms tracking the provisions of the statute or regulations to qualify for preemption, "a creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984). That panel opinion has now been reinstated by the *en banc* court. *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) (en banc). In this case the Court now decides that the different contract provisions before us are not clearly contrary to the requirements of the statute and regulations, so the creditors are entitled to the benefits of federal preemption. The district court's dismissal of this action is affirmed.

The Grants' Claim

In February 1982, plaintiffs Jack and Evelyn Grant purchased a mobile home from Hutchinson Homes, Inc. The parties entered into a retail sales installment agreement on a form contract prepared by defendant General Electric Credit Corporation (GECC), to which Hutchinson Homes assigned the contract shortly after the Grants took possession of the mobile home. The interest rate on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the 10% maximum finance charge then allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 to -38 (Michie 1982).

In March 1983, the Grants instituted a class action against GECC in federal district court alleging a violation of Georgia Usury law and seeking damages and injunctive relief. Anticipating that GECC would raise the defense that the interest rate was valid under section 501 of the federal Act, the Grants alleged that the GECC contract lacked the consumer protections required by the Act as a condition to exempting the

finance charge from the state usury law interest ceilings. The district court dismissed the action as preempted by federal law.

The Grants contend the GECC contract failed to comply with the FHLBB regulations in five particulars. Four of these instances involve the following language contained in one sentence of the GECC contract:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

Following the holding in *Quiller*, we examine separately, in the order in which they were presented, arguments that the GECC contract is directly contrary to the federal statute and regulations.

Right to Notice Prior to Acceleration

The Grants contend that the phrase "Seller may declare immediately due and payable any and all installments due or to become due hereunder . . ." is a "term or condition" of the contract that fails to comply with 12 C.F.R. § 590.4(h), which states that "no action . . . to accelerate payment of the entire outstanding balance of the obligation . . . may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default." The contract language, the Grants argue, reserves for GECC the right to declare the entire contract "immediately due and payable," contrary to the 30-day notice required by the regulations. The GECC contract contains, however, the qualifying clause "provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right."

As held in *Quiller*, the federal preemption statute does not require a disclosure in the contract of the notice rights given by

the Act and regulations, nor does it eliminate the creditor's right to accelerate upon default. A creditor is required to send the debtor a notice of default providing a 30-day grace period during which the debtor may correct the default and continue with the contract as though the default had not occurred. 12 C.F.R. § 590.4(h). The GECC contract's qualifying clause, which is cast in mandatory terms, unambiguously informs the debtor that he or she "shall be given notice of right to cure default" before "seller is permitted" to exercise its right to accelerate. Although the contract does not reveal that the debtor has 30 days in which to cure the default, there is no contention that notices sent to the Grants failed to notify them of the 30-day grace period. That grace period is prominently revealed in the sample notice of default and right to cure contained in the regulations. *See* 12 C.F.R. § 590.4(h)(2).

This "term or condition" of the contract is not contrary to the statute and regulations governing federal preemption.

Acceleration of the Entire Balance

The Grants also contend that the acceleration provision of the contract is contrary to the following portion of the FHLBB regulations:

> In the case of default in payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h). The Grants argue that the contract provision allowing GECC to accelerate "all installments due or to become due hereunder, less the unearned portion of the finance charge" is contrary to the regulations.

The quoted portion of the regulations, however, refers to the content of the notice of default, not to the provisions of the

contract. There is no allegation that GECC sent the Grants a notice of default with language contrary to that of 12 C.F.R. § 590.4.

Provisions Concerning Right to Cure Default

The Grants argue that because 12 C.F.R. § 590.4(h) requires that a debtor be given the right to cure any default for 30 days, and because notice of that fact must be communicated to the debtor, the GECC contract's reference to an undefined "notice of right to cure" is inadequate. Again, however, the Grants take the regulation's requirements for the notice of default and attempt to apply them to the terms of the contract itself. The regulation does *not* provide that "no contact qualifies for preemption" unless it discloses the 30-day notice, but rather that "no action . . . to accelerate . . . may be taken" without the notice. 12 C.F.R. § 590.4(h); *see Quiller*, 727 F.2d at 1070. Thus, the notice section of the regulations is in direct contrast with other sections of the regulations which expressly require disclosure of certain information within the loan contract. *See* 12 C.F.R. § 590.4(d) ("The right to prepay shall be dislosed in the loan contract . . "); *id.* § 590.4(f) ("No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor"). As the *Quiller* court held, 12 C.F.R. § 590.4(h) does not require creditors to recite in the loan contract the specific rights of a defaulting debtor. 727 F.2d at 1070.

Right to Notice Prior to Repossession or Foreclosure

The Grants contend that the Act itself requires that preemption contracts disclose a defaulting debtor's right to 30 days notice prior to repossession or foreclosure. The GECC contract is silent with regard to foreclosure and repossession. Thus, in the absence of express contractual terms authorizing conduct contrary to federal law, this argument is foreclosed by our holding in *Quiller* that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

Although the Grants have not claimed that the GECC contract contains terms or conditions contrary to the right to a 30-day notice prior to repossession or foreclosure, they contend that absence of any reference to that right permits the creditor to repossess without notice by operation of Georgia law. In Georgia, a creditor may repossess by self help without notice unless the contract contains a specific provision to the contrary. O.C.G.A. § 11-9-503; *see also Ford Motor Credit Co. v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978). A creditor may also foreclose upon 7-days notice pursuant to a judicial writ of possession. O.C.G.A. § 44-14-231, -232(b). The Grants' argument fails for the simple reason that the issue before us is not what Georgia law requires, but what the federal preemption scheme requires, as there appears to be no question of fact as to whether the parties intended to enter a federal preemption contract.

We recognize that in individual cases the lack of specific contract language might allow an unscrupulous creditor to foreclose or repossess without notice by preying on consumers unaware of their notice rights under federal law or by litigating before state court judges who might interpret the agreement under Georgia law due to unfamiliarity with the complexities of the federal preemption scheme. But there is no allegation that GECC conducted its business in such a manner. Such an argument would convert the law into a disclosure act. Arguments for such a change must be addressed to the FHLBB or Congress, not to this Court.

Right of Prepayment Without Penalty

As a final challenge to the contract itself, the Grants focus on the requirement of 12 C.F.R. § 590(d):

> A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

The Grants argue that type size of the print was not larger than that used in the body of the contract. A review of the contract

reveals that the prepayment clause is set in type clearly larger than that of the text surrounding it which comprises the "body" of the contract. Although certain headings and clauses in other parts of the contract are set in larger or bolder type, the type size used here is larger than "the body of the document" and fulfills the regulation's purpose to call attention to the provision. *See* 45 Fed.Reg. 43684 (June 30, 1980). The regulation does not require the disclosure in the largest type used in the instrument.

Significantly, the version of 12 C.F.R. § 590.4(d) originally proposed by the FHLBB required that the prepayment clause be "conspicuously disclosed in the loan contract." 45 Fed.Reg. 31124 (May 5, 1980). The FHLBB replaced that phrase with the current type-size requirement because "the Board agree[d] that [the "conspicuous" requirement] may be potentially troublesome." 45 Fed.Reg. 43684 (June 30, 1980). This litigation demonstrates that the alteration in the regulations failed to eliminate "troublesome" disputes.

Defendant's Failure to Show Loan's Entitlement to Federal Preemption

As an alternative ground for reversal, the Grants urge that GECC made no showing that the financing transaction was a "federally related mortgage loan" eligible for preemption under the Act. Throughout the proceedings in the district court, however, the Grants never suggested that given an appropriate contract this financing transaction would fail to qualify for preemption. For instance, in their complaint plaintiffs admitted that "[f]ederal law would have allowed additional interest to be charged had the lender complied with certain prerequisites specified in the federal statute," and then proceeded to enumerate the alleged contractual shortcomings. The closest the Grants came to raising the "federally related mortgage loan" argument in the district court was in their opposition to GECC's motion to dismiss, which remarked:

> Defendant has made no showing in that regard but assuming, for the sake of argument, that the transaction would

> meet the definition of a "federally-related mortgage loan," the next question is whether the terms and conditions of the credit sales contract allow it to be preempted from the state law that would normally govern.

Aside from this isolated statement, which hardly amounts to much more than conceding the issue, the Grants never mentioned, much less argued, to the district court that their financing transaction could not come under the Act. The thrust of the complaint and other papers filed there reflect only the central argument that the "terms and conditions" of the GECC contract failed to satisfy the requirements of the Act and regulations. Having failed to raise the issue before the district court, the Grants cannot raise the issue for the first time on appeal. *See Case v. State Farm Mutual Automobile Insurance Co.*, 294 F.2d 676, 678 (5th Cir. 1961).

Conclusion

The provisions of the GECC contract before us differ significantly from those in the contract found to be contrary to the federal statute and regulations in *Quiller*. We held that the language in the *Quiller* contract inaccurately stated the creditor's rights under the federal preemption scheme by permitting the creditor (1) to foreclose on the loan "without notice," (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." 727 F.2d at 1072. The contract's qualification that these express contractual powers of the creditor were "subject to any notice of right to cure" was held to be vague and equivocal, and in any event, inconsistent with the three specific reservations of creditor's rights to be exercised "without notice." In contrast, GECC's contract makes no mention of the creditor's right to foreclose or repossess upon the debtor's default, nor does it purport to assume such powers in the event of the creditor's general "insecurity." The only specific reservation that GECC did make concerns the right to accelerate upon default. This right is expressly conditioned in clear, mandatory terms upon

the debtor's receipt of notice of right to cure default prior to acceleration. In sum, the affirmative misrepresentations of the debtor's federal statutory guarantees that existed in the agreement in *Quiller* are not present in the GECC contract.

Having held that the "terms and conditions" of the GECC contract satisfied the prerequisites for obtaining the protection of the Federal preemption scheme, we need not address defendant's argument that the Grants' state law claim is foreclosed by Georgia's one-year statute of limitations for usury actions. The order of the district court dismissing the Grants' complaint is therefore

AFFIRMED.

KRAVITCH, Circuit Judge, dissenting, with whom GODBOLD, Chief Judge, and VANCE, Circuit Judge, join:

I respectfully dissent. In *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1985) (en banc), this court reinstated the panel's opinion which held that a contract containing terms contrary to the requirements of the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7 (note), and regulations promulgated thereunder, is not entitled to the protection of federal preemption of state interest rate ceilings. In this case, the majority perceives sufficient distinctions between the language of the *Quiller* contract and the one under scrutiny here to warrant assertion of the preemption defense. Although I agree that General Electric Credit Corporation's (GECC) contract does not suffer from the same defects as the *Quiller* contract, I disagree with the majority's conclusion that GECC's contract is entitled to protection under the federal preemption scheme.

In *Quiller*, we began our analysis of the contract by admonishing that "we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights." 727 F.2d 1061 at 1071. This rule of interpretation is consistent with

Congress's decision to include manufactured home financing in the preemption scheme only on the condition that consumer-debtors would enjoy certain protections under finance agreements. Further, we determined that it would be unrealistic to assume that all inaccurate statements of rights and actions taken pursuant thereto would be remedied through litigation. Although we concluded that to qualify for preemption a financing agreement need not contain an express term guaranteeing the debtor thirty days notice prior to repossession or foreclosure, we held that contracts that affirmatively allowed a creditor to take action inconsistent with the debtor's right to notice and right to cure were not federal preemption agreements. *Id.* at 1072.

GECC's credit agreement provides in part:

> In the event of Buyers' default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right* . . .

(emphasis in italics added). Because the contract grants the creditor the right, upon default, to accelerate immediately payment of any and all installments, it is contrary to 12 C.F.R. § 590.4(h), which prohibits initiation of any action to accelerate payments until 30 days after the creditor sends the debtor a notice of default and right to cure. Further, section 590.4(h) provides that the "sum stated in the notice of default may only include payments in default and applicable late or deferral charges . . ." A provision allowing *all* future payments to become due *immediately* upon default is thus an inaccurate statement of the creditor's rights, in that under section 590.4(h), the debtor has the right to cure the default, by paying the amount in default plus any late charges, *before* the creditor may accelerate payments.

The majority relies on the qualifying clause ("provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right") to conclude that the contract unambiguously informs the debtor of the right to cure the default before the creditor may accelerate payments. Although this provision is not as vague or equivocal as the qualifying clause in the *Quiller* contract, 727 F.2d at 1071-72, in my view it fails to remedy the inaccurate statement of rights already conveyed by the agreement. Read as a whole, the challenged passage could be fairly construed by a consumer-debtor to transmit conflicting messages: the creditor's right to declare immediately upon default that all installments are due, and the debtor's right to cure before the creditor exercises that right. Moreover, there is no explanation that the right to cure means paying only the amount in default plus any late charge. As the majority observes, there is no requirement that this be explained in the contract; yet, given the creditor's right under the contract to accelerate immediately upon default, the unexplained right to cure fails to offer a statement sufficient to qualify the agreement as a preemption contract.[1] As in the

[1]In an effort to reconcile the GECC contract with section 590.4(h), the majority explains that the portion of the regulation setting forth the amount due upon default refers only to the notice of default, not to provisions that must be contained in a preemption contract. 727 F.2d at 1070. I believe the majority overlooks the fact that the agreement grants the creditor the right to accelerate payments immediately upon default. The regulation provides that the sum stated in the notice of default may not exceed the amount in default plus an applicable late charge; thus, a creditor is forbidden to accelerate payments immediately upon default of one payment. The debtor must have the opportunity to cure by paying the amount stated in the notice of default.

Twice the majority observes that there is no allegation that GECC sent the Grants a notice of default that contradicted the form set forth in the regulations. 727 F.2d at 1071. This ignores *Quiller's* focus on the language of the agreement. To await the creditor's actual performance upon default would allow a creditor who drafts a contract that contradicts every right granted to the consumer-debtor by the regulations to claim a preemption defense if there is no effort to enforce the unlawful provision unless the debtor filed a lawsuit. As we observed in *Quiller*, "It would be unrealistic to assume that every illegal act will be corrected through litigation." 727 F.2d at 1071 (citing *General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978)).

Quiller contract, a debtor who reads this provision may receive an accurate impression of his or her rights upon default, if he or she had independent knowledge of the applicable statute and regulations. Absent this, however, a debtor could easily conclude that the creditor can accelerate immediately upon default, subject to some unspecified right to cure. At best, the language of the agreement is ambiguous.[2]

The focus of our *Quiller* decision was to prevent creditors from exercising leverage over unwary consumer-debtors faced with default. Congress sought to ensure that consumer-debtors would not immediately lose their homes upon the failure to tender a single payment on time, by guaranteeing the debtors' right to cure and right to notice before repossession, foreclosure or acceleration. I do not believe that GECC's credit agreement fulfills this purpose. Accordingly, I would hold that the GECC contract is not entitled to the benefits of federal preemption.

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[2]Language, of course, can be inherently ambiguous, and some debtors may not understand their rights under an agreement no matter how clear the terms. Nonetheless, although the statute and regulations do not require that certain provisions be set forth explicitly in an agreement, the onus is on the creditor who wishes to claim the preemption defense to draft a document that does not contradict rights guaranteed by the regulations. When doing so, the creditor must employ language that makes the contract readily understandable by a reasonable consumer-debtor. *Quiller*, 727 F.2d at 1071. *Cf. Jeter v. Credit Bureau*, 760 F.2d 1168 (11th Cir. 1985) (to determine whether Fair Debt Collection Practices Act has been violated, court is obligated to decide whether least sophisticated consumer would be deceived, mislead, or harassed by creditor's actions).

APPENDIX B

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

GENERAL ELECTRIC CREDIT CORPORATION,

Defendant-Appellee

No. 83-8456

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984.

Opinion on Granting of Rehearing En Banc May 22, 1984.

[Reported at 727 F.2d 1073 (1984)]

Appeal from the United States District Court for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

Plaintiff-appellants purchased a mobile home from Hutchinson Homes, Inc. in February 1982. The parties entered into a retail installment sales contract on a form prepared by the defendant-appellee, General Electric Credit Corporation (GECC), which obtained the contract by assignment from Hutchinson shortly after the Grants took possession of the home. The rate of interest on the contract exceeded an add-on rate of 13.6%, 3.6% higher than the maximum finance charge on mobile home contracts allowed under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982).

The Grants filed a complaint in the District Court for the Southern District of Georgia on behalf of themselves and a class of all persons similarly situated, seeking damages and injunctive relief for the alleged violation of Georgia law. In addition to setting forth the state law claim, the complaint attempted to refute an anticipated defense that the high interest rate was valid under § 501 of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735F-7 note) (the "Act"), which preempts state usury laws governing mobile home financing if the lender complies with certain consumer protection regulations. Attached to the complaint was a copy of the financing agreement. After a hearing on defendant's motion to dismiss for failure to state a claim, the district court dismissed the action, concluding that the Act governed the contract and that the finance charge was thus protected under federal law. We reverse.

The Grants alleged in their complaint and maintain on appeal that GECC did not comply with the conditions imposed by the Act and the implementing regulations, and that the contract is therefore governed by Georgia law. Specifically, they contend that the contract impermissibly allows GECC to immediately declare the entire contract due and payable upon the buyer's default without giving the debtor thirty days notice and right to cure as provided in the Act and 12 C.F.R. § 590.4(h) (1983).[1]

This case is controlled by our decision in *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (1984), where we held that although neither the Act nor the regulations requires the lender to include a thirty-day notice provision in the financing agreement, if the contract contains a term or condition incon-

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[1]In an amended complaint filed shortly before the district court rendered its decision and in their appeal to this court, the Grants have alleged additional reasons why their contract does not comply with federal law. Because we decide *infra* that the Grants are entitled to a reversal of the district court's dismissal based upon the contract's failure to accurately state the creditor's right to accelerate, we need not decide the validity of their other contentions.

sistent with the regulations, the creditor may not obtain the benefits of the federal statute.

Section 501(c) of the Act authorizes the preemption of state usury limits only if the "terms and conditions" of the loan agreement comply with the consumer protection regulations promulgated by the Federal Home Loan Bank Board. The regulation applicable to this contract provides:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default* . . . In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges . . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added).

The Grants' contract provides in part:

> In the event of Buyer's default in payment when due, Seller may declare *immediately* due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Deferential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right* . . .

This passage is directly contrary to the statute and § 590.4(h) of the regulations because it grants the creditor the right, upon default, to immediately accelerate payment of any and all installments due or to become due under the contract. The regulation unequivocally forbids the creditor from immediately demanding all installments due and payable upon default; it can only do so thirty days after the creditor sends the debtor notice of default and right to cure. Moreover, the regulation provides that the sum stated in the notice may only include payments in default plus any applicable late charges. The creditor may not, as this contract allows, declare all installments due and payable

as soon as the debtor defaults one payment. A provision allowing all future payments to become due immediately upon default is an inaccurate statement of the creditor's rights in the federal scheme.

The qualifying clause here ("provided that Buyer shall be given notice of right to cure. . . .") may more accurately inform the debtor of his absolute right to notice than did the qualifying clause in *Quiller*,[2] but the clause does not remedy the inaccurate statement of the creditor's power already conveyed. The passage transmits two conflicting messages: the creditor's right to declare all installments immediately due and payable and the debtor's right to cure before the creditor exercises that right. As in the *Quiller* contract, a debtor reading this provision might receive an accurate impression of his rights if he is aware of the federal statute, but absent this outside knowledge, the debtor can only conclude that the creditor may accelerate immediately upon default, subject to some unspecified right to cure.

Since § 590.4(h) forbids immediate acceleration, the contract does not comply with the regulation. When a financing agreement includes a term that is inconsistent with one of the Act's implementing regulations, the applicability of state law to the contract is not preempted. We therefore reverse the district court's dismissal of the complaint. REVERSED and REMANDED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissent in *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1072 (11th Cir. 1984).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDER-

[2]The contract in *Quiller* allowed the lender to foreclose, repossess or accelerate payment "without notice, subject to any notice of right to cure . . ." 727 F.2d at 1071 (1983) [sic].

SON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges of this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYS AMERICAN/CREDIT, INC.,

Defendant-Appellee

No. 83-8455

United States Court of Appeals,
Eleventh Circuit
July 8, 1985.

[Reported at 764 F.2d 1400 (1985)]

Appeal from the United States District Court for the Southern District of Georgia

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, and ANDERSON, Circuit Judges.*

PER CURIAM:

Arthur and Lillie Mae Quiller filed a class action against Barclays American/Credit, Inc., in the Superior Court of Richmond County, Georgia, alleging a violation of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982). After removing the case to the United States District Court for the Southern District of Georgia, Barclays moved to dismiss for failure to state a claim, contending *inter alia* that the action was precluded by the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note). The district court granted Barclays' motion to

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*Judge Thomas A. Clark, recused himself and did not participate in this decision.

dismiss, but a panel of this court reversed the order of dismissal and remanded the case for further proceedings. *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984).

On rehearing *en banc*, we agree with the panel's disposition of the case. We therefore affirm and reinstate the panel opinion. The district court's order granting Barclays' motion to dismiss is REVERSED, and the case is REMANDED for further proceedings.

RONEY, Circuit Judge, dissenting, with whom TJOFLAT, JAMES C. HILL, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

The Court holds *first* that the contract is expressly contrary to the federal statute and regulations comprising the federal preemption scheme because it permits the creditor to foreclose, repossess, or accelerate upon the debtor's default "without notice" and *second*, that the plaintiff is entitled to the remedies available under Georgia usury law. I dissent from both of these decisions. Although not a model of clarity, the contract is not necessarily contrary to the federal scheme. The provisions of the contract are at worst ambiguous. Being ambiguous, the contract cannot be held invalid on a motion to dismiss. To the extent the contract is contrary to the conditions required by federal preemption law, there are more suitable remedies that the district court should consider before giving the plaintiff the state usury remedies.

I

As to the provisions of the contract, there are substantial arguments that the contract does not violate the law at all. As noted by the Federal Home Loan Bank Board (FHLBB) in its amicus curiae brief, both the preemption Act and the agency regulations provide circumstances in which the creditor may repossess, accelerate, or foreclose "without notice." The Act directs FHLBB to issue a regulation that requires

> a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances).

Pub.L. No. 96-221, Title V, § 501(c)(2), 94 Stat. 161 (1980) (codified at 12 U.S.C.A. § 1735F-7 note). The implementing regulations provide:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. . . The debtor is not entitled to notice of default more than twice in any one-year period.

12 C.F.R. § 590.4(h)(1). Thus, in three separate situations a creditor may in fact accelerate, repossess, or foreclose without giving the 30-day notice otherwise required under section 590.4(h): (1) abandonment; (2) other extreme circumstances; and (3) upon the debtor's third default in a one-year period. Consequently, the contract's assertion that creditor may take action "without notice" upon debtor's default is not, as the court suggests, an "affirmative misrepresentation as to [the debtor's] statutory guarantees." 727 F.2d at 1072.

In all other default situations, the creditor is required to give the 30-day notice. The contract provides that the creditor's express powers to foreclose, accelerate, or repossess are "subject to any notice of right to cure." The court notes that "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure." 727 F.2d at 1072 (emphasis in original). As pointed out above, however, the right to cure is not "absolute" in at least three specified circumstances. Given that the court concedes that the qualifying clause informs the debtor that he *may* have a right to cure, that is all that is necessary. For the court to hold that the creditor had to use language more specific than "subject to any notice of right to cure" undercuts

the court's holding that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure." 727 F.2d at 1071.

It would be inconsistent with federal law for a preemption contract to claim an unqualified right to acceleration, repossess, or foreclosure "without notice." But because in some situations a creditor may indeed exercise such powers without notice, it is not inconsistent with federal law for a preemption contract to claim such a right "subject to any notice of right to cure," the express qualification contained in the Quiller contract. The contract language therefore does not prevent the loan from meeting the "terms and conditions" of the federal statute and regulations.

II

At most the contract would be ambiguous. With that determination, the court should remand for the district court to determine the intent of the parties. The contract was written to be a federal preemption contract. The words "FEDERAL PREEMPTION CONTRACT" appear in the contract in the bottom left corner of the very same page as the language held to be contrary to the federal preemption scheme. The conduct of the parties, the intention to make the agreement a federal preemption contract, and the intent of the borrower to make a legal contract and to pay the higher interest rate become relevant.

In holding that the agreement is contrary to the statute and regulations, the court characterizes the offending provisions as "inaccurate statements of the creditor's rights under federal law." *Id.* at 1072. Be that as it may, the contract does contain the "vague qualification" that its claimed powers to immediately foreclose, repossess, and accelerate are "subject to any notice of right to cure." The court acknowledges that "[t]he qualification would, at most, inform the debtor that he *may* have a right to cure." *Id* at 1072 (emphasis in original). In view

of the ambiguity created by this "inconsistent language," this case should be remanded to the district court to conduct an evidentiary hearing, if necessary, to determine whether the parties intended to enter a federal preemption contract, and, if so, what was intended by the ambiguous language.

This is not to say, however, that the creditor could receive the benefits of federal preemption were it in fact to exercise its powers upon a debtor's default in a manner inconsistent with the federal statute and regulations. Nor would contract language that, unlike the language in the contract here, was indeed contrary to the consumer protections provided by the Act and regulations be saved by a creditor's actual compliance with the Act and regulations. The case before us, however, on appeal from the district court's order granting defendant's motion to dismiss, presents neither of those situations.

III

Once the "terms and conditions" are established, then the relief a party is entitled to obtain in court is to have the contract enforced according to those "terms and conditions." For a class, this may either be a declaratory decree or an injunction requiring the creditor to follow the contract's "terms and conditions."

In any event, the problem with notice might be easily curable by remedies not as harsh as that held by the court. At most, the case should be remanded to the district court to consider remedies that would preserve the bargain the parties intended to make. There is no question but that the parties intended to contract for a legal interest rate under the federal preemption law. The Georgia law of usury under O.C.G.A. § 10-1-33 makes the civil penalties of the Georgia Motor Vehicle Sales Finance Act applicable:

> A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

O.C.G.A. § 10-1-38(b). Asserting that the violation was wilful, the Quillers seek to recover double the time price differential under O.C.G.A. § 10-1-38(c). The penalty provisions do not authorize forfeiture of the unpaid principal of loans held violative of section 10-1-33. *See Bozeman v. Tifton Federal Savings & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982); *Kelly v. Sylvan Motors, Inc.*, 160 Ga. App. 420, 287 S.E.2d 359, 360 (1981); *Ford Motor Credit Co. v. Spann*, 153 Ga. App. 535, 265 S.E.2d 863, 865 (1980); *Cook v. First National Bank*, 130 Ga. App. 587, 203 S.E.2d 870, 871 (1974); *see also Barrett v. Vernie Jones Ford, Inc.*, 395 F.Supp. 904, 909 (N.D. Ga. 1975), *aff'd*, 578 F.2d 1185 (5th Cir. 1978). Georgia law indicates that the lender may recover this principal through the borrower's continued payments under the contract, unless the borrower was still in default after adjustment had been made to account for the forfeiture of the finance charge. *See Spann*, 265 S.E.2d at 865; *Bozeman*, 297 S.E.2d at 52. Nevertheless, the penalty sought by the Quillers would be harsh in a case where both parties intended to enter into a federal preemption contract governed by federal preemption law, under which the finance charge charged by Barclays/American and agreed to by the Quillers was legal.

Rather than applying state usury laws to require forfeiture of the finance charge, a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer. Such an approach was taken by this Court in a case where a provision of a loan contract violated regulations promulgated under the Georgia Industrial Loan Act. *Robinson v. Central Loan and Finance Corp.*, 609 F.2d 170, 175 (5th Cir. 1980). Severance of the objectionable provisions of the loan contract would be consistent with the "well known principle of contract law that an illegal contract provision, or one contrary to public policy, when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless." *Vineberg v. Brunswick Corp.*, 391 F.2d 184, 186 (5th Cir. 1968). The

provisions of the contract held to be contrary to federal regulations certainly could be severed from the contract before us without rendering it meaningless, especially in light of the fact that the contract before us contained a severability clause providing:

> If any part of this contract is invalid, unenforceable or inconsistent with the applicable laws or regulations of the State of Seller's address herein, such part shall be deemed amended, modified or deleted to conform thereto.

The Quillers contend that *Harrison v. Goodyear Service Stores*, 137 Ga. App. 223, 223 S.E.2d 261 (1976), and *General Finance Corp. v. Sprouse*, 577 F.2d 989 (5th Cir. 1978), support application of the forfeiture provisions of O.C.G.A. § 10-1-38 in this case. In those cases, however, there was no dispute that the parties intended to enter contracts governed by Georgia law. *See Harrison*, 223 S.E.2d at 263 (contract governed by Georgia Retail Installment and Home Solicitation Sales Act); *Sprouse*, 577 F.2d at 991 (parties agreed contract was governed by Georgia Industrial Loan Act). Both decisions penalized creditors for charging or contracting to charge interest rates in excess of the statutory maximum under Georgia law. In contrast, in the case before us, the creditor contracted for a finance charge that was clearly permissible under federal law if the terms and conditions of the loan contract complied with federal law. In the event the district court finds that the parties intended to enter a legal contract under federal law, *Harrison* and *Sprouse* present no obstacle to a severance and injunctive remedy that would conform the terms and conditions of the contract to federal law rather than forfeiture of the finance charge. Thus, even if the terms and conditions of the loan contract were contrary to federal law, the proper remedy would be to enjoin enforcement of those provisions absent any evidence that the creditor intended to enforce the illegal terms.

JAMES C. HILL, Circuit Judge, dissenting, with whom, FAY and R. LANIER ANDERSON, III, Circuit Judges, join:

I wholeheartedly concur with Judge Roney in his dissent, and write here only to express my fears that the court's treat-

ment of this preemption loan agreement forecasts an excursion into hypertechnical "gamemanship" similar to that apparent in litigation under the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*

The usury preemption act was passed in 1980 during a time of historically high interest rates, when consumers who wished to purchase premanufactured homes were unable to obtain financing because financial institutions were unwilling to lend money for their purchase at the relatively low statutory interest levels prevailing in many states. In passing the preemption act, Congress constructively undertook to ease the severity of the mortgage credit crunch and insure the availability of mortgage credit in these states. S.Rep. No. 96-368, 96th Cong., 2d Sess. 18-19 (1979), *reprinted in* 1980 U.S. Code Cong. and Ad.News 236, 254-55. Although Congress concluded that purchasers of financing for premanufactured homes were entitled to additional consumer protections in order for their mortgages to fall within the preemption act, there is no doubt that the overriding objective of the act was to assist both borrowers and lenders by freeing up additional credit for housing. This was not intended to be a consumer protection disclosure act.

The majority opinion does not further the constructive purpose of the preemption act. The court holds that a lender loses the protection of the preemption act and is subject to the forfeiture provisions of state usury laws on the basis of a contractual provision which is, at the most, merely ambiguous; even though both parties intended to enter into a federal preemption contract governed by federal law. This encourages a TILA-like game of "gotcha," where a borrower who wishes to serve as a class representative subjects the contracts to microscopic examinations to determine if it might be possible to claim damages for perceived disclosure violations in a situation where no "unwary" consumer has been misled. *See Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1385-86 (11th Cir. 1984) (TILA violation) (Hill, J., dissenting).

The approach taken in the dissent authored by Judge Roney would further the purpose underlying the preemption legisla-

tion, while at the same time protecting the borrower from any violation of the federal act. A borrower can be adequately protected from actual violations of the act when and if they occur, at which time a counter-claim along the lines of the present action might be entertained. However, the sort of search for errors in draftsmanship upon which claims of violations might be predicated, encouraged by the court in this case, constitutes the court's enmity to the preemption act and a judicial attempt to defeat its purposes. Such "gamesmanship," permitted by the court, has made what I perceive to be a mockery of the truth-in-lending laws. I hope that we do not travel down that road again in connection with this very useful law.

APPENDIX D

ARTHUR QUILLER, LILLIE MAE QUILLER, and all other persons similarly situated,

Plaintiffs-Appellants,

v.

BARCLAYS AMERICAN/CREDIT, INC.

Defendant-Appellee.

No. 83-8455

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984.

Opinion on Granting of Rehearing
En Banc May 22, 1984.

[Reported at 727 F.2d 1067 (1984)]

Appeal from the United States District Court
for the Southern District of Georgia.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

To finance their purchase of a new mobile home, plaintiff-appellants entered into a retail installment sales contract, which the mobile home dealer then assigned to the defendant-appellee credit corporation, Barclays American/Credit, Inc. The Quillers' agreement obligated them to pay finance charges exceeding a thirteen percent add-on rate, in apparent violation of the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§ 10-1-30 to -38 (Michie 1982), which limits the finance charge on sales of new mobile homes to a ten percent add-on. Alleging a violation of the Georgia Code, plaintiffs filed a class action against Barclays in the Superior Court of Richmond County, Georgia, seeking class certification, a declaratory judgment

barring the defendant from collecting any finance charges from the named plaintiffs and all other persons similarly situated, and damages in an amount double the time-price differential for wilful violation of the Georgia act. Barclays then removed the case to the United States District Court for the Southern District of Georgia.

The applicability of state usury laws, however, has been greatly curtailed by federal legislation. Financing agreements that satisfy the requirements of the Depository Institutions Deregulation and Monetary Control Act, Pub.L. No. 96-221, Title V, § 501, 94 Stat. 161 (1980) (codified at 12 U.S.C. § 1735f-7 note) (the "Act"), are exempt from state law interest ceilings. The Quillers' complaint alleged that their contract was not insulated from the ceiling imposed by the Georgia statute because the agreement did not comply with the prerequisites for preemption under federal law. Specifically, they charged that their contract did not contain a provision requiring the lender to notify the debtor thirty days prior to instituting any action leading to repossession or foreclosure, thus violating the Act and one of the regulations promulgated thereunder, 12 C.F.R. § 590.4(h) (1983). Attached to the complaint was a copy of the installment sales contract.

Barclays moved to dismiss for failure to state a claim, contending that the cause of action was barred as a matter of law by the Act and the statute of limitations. Pretermitting the statute of limitations question, the district court dismissed the action as precluded by the federal statute. We disagree and reverse the order dismissing the Quillers' claim.

Our threshold inquiry is whether the district court's dismissal was procedurally premature. The Quillers' contract states a claim for relief under Georgia law—the charging of a usurious interest rate, which, if proved, would entitle them to relief for violation of the Georgia Motor Vehicles Sales Finance Act. Barclays' Rule 12(b)(6) motion alleges the affirmative defense of federal preemption of the Georgia statute. Generally, the existence of an affirmative defense will not support a motion to

dismiss. Nevertheless, a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint. *See, e.g. Concordia v. Bendekovic*, 693 F.2d 1073 (11th Cir. 1982) (party may raise affirmative defense of res judicata by 12(b)(6) motion when defense's existence may be judged on face of complaint); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 n. 6 (5th Cir. 1977) (defense of statute of limitations may appear on face of complaint); *see generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 (1969). The claim may be adequately stated, as it is here, but in addition to the claim the complaint may include matters of avoidance that preclude the pleader's ability to recover. When this occurs, the complaint has a built-in defense and is essentially self-defeating. "[T]he problem is not that plaintiff merely has anticipated and tried to negate a defense he believes his opponent will attempt to use against him; rather plaintiff's own allegations show that the defense exists." *Id.* Although the Quillers' complaint would not be vulnerable to dismissal simply because they anticipated and attempted to negate the defense of federal preemption, if the complaint itself demonstrates that the Act governs the contract, a Rule 12(b)(6) dismissal would be proper.

Because the Quillers attached the installment sales contract to their pleadings, the district court properly examined the document to determine whether the defense of federal preemption was apparent on the face of the complaint. If the contract and complaint demonstrate that Georgia law does not apply because the agreement is governed by the Act, the action should be dismissed because it would appear beyond doubt that the Quillers could prove no set of facts in support of their claim. The district court therefore was procedurally correct in looking at the contract to determine whether it complied with the requirements of the federal statute.

Turning to the substance of the motion to dismiss, we first observe that the Act preempts state law limits on finance charges for sales of residential manufactured homes only if the

financing arrangement complies with certain consumer protection regulations. Section 501(c) of the Act provides that the statute

> *shall not apply* to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home *unless the terms and conditions relating to such loan*, mortgage, credit sale, or advance *comply* with *consumer protection provisions* specified in regulations prescribed by the Federal Home Loan Bank Board. *Such regulation shall*— . . . .
>
> (2) *require a 30-day notice* prior to instituting any action leading to repossession or foreclosure. . . .
>
> and (4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

Pub.L. No. 96-221, Title V, § 501(c) (emphasis added).

The regulation implementing subsection (c)(2) states:

> *[N]o action to repossess or foreclose, or to accelerate payment* of the entire outstanding balance of the obligation, *may be taken* against the debtor *until 30 days after the creditor sends the debtor a notice of default* . . .

12 C.F.R. § 590.4(h) (1983) (emphasis added). The Quillers alleged in their complaint and maintain on appeal that the statute and regulation require the financing agreement to include a provision guaranteeing the debtor thirty days notice before repossession or foreclosure. Since their agreement contains no such clause, they contend that the contract is not protected under the preemption statute and thus is governed by Georgia law.[1]

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[1]On appeal the Quillers have argued additional reasons why their contract fails to qualify for protection under the Act. Since we decide *infra* that Barclays is not entitled to the benefits of federal preemption because the contract contravened the federal notice requirements, we need not decide the validity of the Quillers' other arguments.

We reject the Quillers' interpretation of the statute and regulation. Neither requires that a thirty-day notice provision appear in the contract. The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves. When subsection 590.4(h) is read in conjunction with other regulations implementing the Act, it becomes clear that the Federal Home Loan Bank Board (the "Board") did not intend to require that the debtor's right to thirty days notice be recited in the contract. Subsection 590.4(d) (prepayment without penalty),[2] (e) (terms of balloon payments),[3] (f) (late charges),[4] and (g) (agreement for deferral of fees)[5] all contain express, unambiguous statements requiring specific rights of the debtor to be delineated in the written agreement. Subsection (h) contains no similar requirement. If an express contractual notice provision had been intended, the Board would have so provided in unambiguous terms.

Nor does the statute itself require a contractual notice provision. It states only that a loan does not qualify for federal protection unless the terms and conditions relating to such a

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[2]12 C.F.R. § 590.4(d) provides: "*Prepayment penalties* . . . The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document."

[3]12 C.F.R. § 590.4(e) provides: "*Balloon Payments.* (1) No creditor may enter into an agreement with a debtor which requires or anticipates a schedule for payments under which any one payment is more than twice the amount of an otherwise regularly scheduled payment . . . (3) The parties may agree in writing to payments that are not substantially equal or that are paid at unequal intervals. . ."

[4]12 C.F.R. § 590.4(f) provides: "*Late Charges.* (1) No late charge may be assessed, imposed, or collected unless provided by written contract between the creditor and debtor. . . ."

[5]5. 12 C.F.R. § 590.4(g) provides: "*Deferral Fees.* (1) With respect to mobile home transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and (i) Provide . . ."

loan comply with the consumer protection regulations of the Board. Rather than regulating the specific terms of the financing agreements, the statute delegates this authority to the Board. Although subsection (c)(2) does direct the Board to promulgate a thirty-day notice regulation, the statute does not demand that the regulation require the notice provision to appear in the contract. The Act merely requires the agreement to comply with the regulations, which do not themselves require an express notice provision.

Our construction of regulation 590.4(h) and the statute is consistent with the Board's own interpretation. An opinion letter of the Board's general counsel concludes, "This requirement [§ 590.4(h)] refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements . . . expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice." 5 Fed.Banking L.Rep. ¶ 83,027 (1983). In an amicus brief filed by the Board in this case, the agency has embraced the conclusion of its general counsel. Since the agency's view of its own regulation and the statute it oversees in not "demonstrably irrational," we would give great weight to its interpretation. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790, 797, 63 L.Ed1e 22 (1980); *see also Sage v. Freedom Mortgage Co.*, 704 F.2d 1519, 1521 (11th Cir. 1983) (en banc). We therefore hold that to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor thirty days notice before repossession or foreclosure.

Although federal law does not mandate a contractual notice provision, the creditor cannot obtain the benefits of preemption if the financing agreement contains express provisions authorizing conduct *contrary* to the statute or regulations. While there is no affirmative duty to disclose to the debtor his statutory right to notice before repossession or foreclosure, if the contract permits the creditor to repossess or foreclose immediately upon default, the "terms and conditions" relating to the loan agreement do not comply with regulation § 590.4(h) and the creditor cannot claim the benefits of federal preemption.

In determining whether the terms and conditions of this agreement comply with the Board's consumer protection regulations, we should keep in mind that Congress included manufactured home financing in its preemption scheme only on the condition that consumer-debtors would be guaranteed certain safeguards. *See* H.Conf.Rep. No. 96-842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S.Code Cong. & Ad.News 298, 309. Because purchasers of mobile homes frequently are unaware of complicated rules of contract construction, we should examine the contract through the eyes of the typical consumer and determine whether the lender could use the terms of the contract to impose illegal burdens on a debtor with no knowledge of his statutory rights. It would be unrealistic to assume that every illegal act will be corrected through litigation. *See General Finance Corp. of Georgia v. Sprouse*, 577 F.2d 989 (5th Cir. 1978) (when interpreting contracts in light of consumer legislation, court should consider actual operation of contract in commercial world, effect upon consumer not familiar with legal rights, and risk that contract might allow lender to employ ambiguous provisions to his advantage). The rule of construction that ambiguities and inconsistencies should be resolved against the drafter, *Landale Enterprises, Inc. v. Berry*, 676 F.2d 506 (11th Cir. 1982), is particularly appropriate in the area protected by consumer legislation.

The Quiller contract provides in part:

> If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, *the full balance may, upon election of Holder, without notice, subject to any notice of right to cure, become due and payable*, less the required rebate of the Finance Charge . . . . Customer agrees in any such case to pay said amount or, at Holder's election, to deliver the Collateral to Holder, and Holder may, *without notice or demand for performance or legal process*, peaceably enter any premises, but not into any dwelling, where the Collateral may be found, peaceably take possession of it and custody of anything found in it.

The agreement includes language that, on its face, is contrary to the requirements of the statute and regulations. It permits the creditor (1) to foreclose on the loan "without notice;" (2) to repossess "without notice or demand for performance or legal process;" and (3) to demand payment of the full balance upon the debtor's default or the creditor's insecurity "without notice." These provisions are inaccurate statements of the creditor's rights under federal law. The only language that might apprise the debtor of his statutory right to notice is the vague qualification that the creditor's express, contractual powers to immediately foreclose, repossess and accelerate are "subject to any notice of right to cure." Unless the debtor has acquired knowledge of his statutory right to cure from some outside source, however, this language will not accurately notify him of his contractual rights. The qualification would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure. This inconsistent language goes further than simply remaining silent on the debtor's right to notice upon default; by declaring the creditor's unauthorized power to foreclose immediately, the consumer is given an affirmative misrepresentation as to his statutory guarantees.

Barclays contends that its contract does comply with the regulations because § 590.4(h) cannot be violated until the creditor actually forecloses, repossesses or accelerates payment without giving thirty days notice. The argument misconstrues the language of the Act and the policies behind it. The statute and regulations allow a creditor to draft a contract that does not expressly grant the debtor a right to thirty days notice. But when the contract affirmatively allows the creditor to foreclose, repossess or accelerate payment immediately upon default, subject to an undefined, potential right to cure, the "terms and conditions" relating to the loan agreement do not comply with the regulations or the statute. By authorizing immediate action upon default, Barclays has introduced a contract term that violates the Act. It may not claim the benefits of the federal law while at the same time failing to provide the

consumer protections that are the price for those benefits. We therefore hold that the Quiller contract does not qualify for protection under the preemption statute. The district court's grant of defendant's motion to dismiss on this ground is REVERSED, and we REMAND for further proceedings.

RONEY, Circuit Judge, dissenting:

I respectfully dissent from the Court's holding that the Quiller contract does not qualify for protection under the Federal Preemption Statute. I agree with the Court that the thirty-day notice provision is not required to be in the contract. I cannot agree that the remedy applied here is suitable because of the language in the contract concerning the notice requirement.

When the contract is obviously drawn and intended by all parties to permit them to take advantage of the Federal Preemption Statute, it is unduly harsh to throw the whole contract out just because it contains language which appears to violate the thirty-day notice requirement. Rather than applying state usery [sic] laws to a contract which could not have been validly made thereunder, it would be more equitable to simply invalidate this contract clause to the extent it violates the consumer regulations, and enjoin enforcement if that remedy is deemed necessary to protect the consumer.

This result would further the twin aims of the Federal Preemption Act, assuring the availability of consumer credit for the purchase of manufactured housing and according protection to consumer borrowers, without interfering so unnecessarily with a carefully conceived financing program established to meet the needs of both parties in a time of rising money costs.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDER-

SON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JACK GRANT, JR. and
MRS. EVELYN H. GRANT,

Plaintiffs

VS.

GENERAL ELECTRIC CREDIT CORP.,

Defendant

Civil Action
CV183-96

ORDER

Presently before the Court is the defendant's motion to dismiss. In support of its motion, defendant asserts that the plaintiffs' claims are barred as a matter of law by federal preemption and the statute of limitation.

Pretermitting the defendant's statute of limitations argument, I conclude, in light of the arguments heard in this matter on June 10, 1983, that the defendant's motion is well-founded. Accordingly, it is hereby GRANTED.

ORDER ENTERED at Augusta, Georgia, this *14th* day of June, 1983.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

Order filed in the U. S. District Court, Augusta Division on June 15, 1983

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, Title V, § 501, March 31, 1980, 94 Stat. 161, 12 USCA § 1735f-7 note, as amended by Pub. L. 96-399, Title III, §§ 308(c)(6), 324(a),(e), Oct. 8, 1980, 94 Stat. 1641, 1647, 1648; Pub. L. 97-35, Title III, § 384, Aug 13, 1981, 95 Stat. 432, provides that:

> (a) (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; and
>
> (C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)) [section 1735f-5(b) of this title], except that for the purpose of this section—
>
> (i) the limitation described in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the property must be designed principally for the occupancy of from one to four families shall not apply;
>
> (ii) the requirement contained in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation nor to a loan or credit sale secured by a first lien on a residential manufactured home;

(iii)the term 'federally related mortgage loan' in section 527(b) of such Act [section 1735f-5(b) of this title] shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise meets the definitional requirements of section 527(b) of such Act [section 1735f-5(b) of this title], as those requirements are modified by this section;

(iv) the term 'residential loans' in section 527(b)(2)(D) of such Act [section 1735f-5(b) (2)(D) of this title] shall also include loans or credit sales secured by a first lien on a residential manufactured home;

(v) the requirement contained in section 527(b)(2)(D) of such Act [section 1735f-5(b)(2)(D) of this title] that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act [section 1735f-5(b) of this title] or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [section 1602(f) of Title 15, Commerce and Trade], as such section was in effect on the day preceding the date of enactment of this title [Mar. 31, 1980], if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

(vi) the term 'lender' in section 527(b)(2)(A) of such Act [section 1735f-5(b)(2)(A) of this title] shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [this chapter], and any individual who finances the sale or

exchange of residential real property or a residential manufactured home which such individual owns and which such individual occupies or has occupied as his principal residence.

(2) (A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or reserved shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term 'depository institution' means—

(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iii)any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) [section 1752 of this title];

(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [section 1422 of this title]; and

(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [section 1730a of this title].

(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act [section 1813 of this title], located in the Commonwealth of Puerto Rico.

(b) (1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to—

(A) any loan, mortgage, credit sale, or advance which is made after the date such action was taken pursuant to a commitment therefor which was entered during the period beginning on April 1, 1980, and ending on the date on which such States takes such action; and

(B) any loan, mortgage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

(4) At any time after the date of enactment of this Act [Mar. 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured

by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—

(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges and deferred fees;

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is

less than $1. The Federal Home Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act [Mar. 31, 1980].

(e) For the purpose of this section—

(1) a 'prepayment' occurs upon—

(A) the refinancing or consolidation of the indebtedness;

(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

(C) the entry of a judgment for the indebtedness in favor of the creditor;

(2) the term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

(3) the term 'precomputed finance charge' means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2) [section 1605(a)(1) and (2) of Title 15, Commerce and Trade] as computed by an add-on or discount method; and

(4) the term 'residential manufactured home' means a manufactured home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 [now the National Manufactured Housing Construction and Safety Standards Act of 1974 (section 5402(6) of Title 42, The Public Health and Welfare)] which is used as a residence.

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(g) This section takes effect on April 1, 1980.

OCGA § 10-1-33(a) provides in pertinent part that:

(a) Notwithstanding any other law, the finance charge, exclusive of insurance and other benefits and official fees, shall not exceed the following rates:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled — $10.00 per $100.00. per year.

OCGA § 10-1-38(b)(c) provides in pertinent part that:

(b) A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

(c) In case of a willful violation of this article with respect to any transaction, the buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of $100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction, but the seller may recover from the buyer an amount equal to the cash price of the goods or services in such transaction and the cost of any insurance purchased by the seller for the buyer in connection therewith.

REGULATIONS

45 Fed. Reg. 31122 (May 12, 1980) (proposed May 5, 1980) provides in pertinent part:

SUPPLEMENTARY INFORMATION:

Background

The Federal Home Loan Bank Board is proposing amendments to its regulations in 12 CFR 590.4 on the

preemption of state usury ceilings on mobile home loans (*see* 45 FR 24112, April 9, 1980). At present, these regulations, which implement section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("Act"), Pub.L. 96-221, 94 Stat. 161, provide that interest rates on mobile home loans made by any covered lender after March 31, 1980, may exceed state usury ceilings if, in the event of prepayment, unearned precomputed finance charges on the outstanding loan balance are refunded to the borrower in an amount not less than that computed by the actuarial method.

The Act provides that the actuarial rebate will be the only limitation on the usury preemption with respect to mobile home loans until the Board adopts regulations requiring more extensive protections for the mobile home buyer. Once the Board adopts such regulatory provisions (which must be effective by July 30, 1980), state usury ceilings may be exceeded by a lender covered by the Act only if the loan complies with such regulations. A mobile home loan not complying with the regulations would be open to attack under state usury laws.

45 Fed. Reg. 43681 (June 30, 1980) provides in pertinent part that:

SUMMARY: The rules prescribe consumer protections which must be included in loans secured by first liens on mobile homes before such loans are eligible for the state usury law exemption contained in section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 and implementing regulations (12 C.F.R. Part 590).

45 Fed. Reg. 43681, 43682 (June 30, 1980) provides in pertinent part that:

DISCUSSION OF FINAL AMENDMENTS

Applicability. These regulations apply only when a creditor covered by the Act chooses to charge an interest rate which exceeds the state's usury limit on mobile home loans.

12 C.F.R. § 590.4 provides that:

§ 590.4 Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A 'prepayment' occurs upon—

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii)The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term 'precomputed finance charge' means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term 'creditor' means any entity covered by this Part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.*

(1) The provisions of the Constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on a residential mobile home if a creditor covered by this Part complies with the consumer protection regulations of this section.

(2) *Relation to State Law.*

(i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the Board determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the FEDERAL REGISTER and shall operate prospectively.

(ii) Any interested party may petition the Board for a determination that state law requirements are more protective of consumers that the provisions of this section. Petitions shall be sent to: Secretary to the Board, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, D.C. 20552, and shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary enforcement responsibilities for the subject state law provisions, indicating how the state law to be considered offers greater protection to consumers that the Board's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section, assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section),

under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments—*

(1) *Federal associations.* Federal association creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and § 545.33(f) of this chapter.

(2) *Other creditors.* All other creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges.*

(1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable State law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable State law does not provide for a lower charge or longer grace period, a late charge on any installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed the lesser of $5.00 or five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under State law for such contracts, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees.*

(1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii)Disclose each installment or part thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable; and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(..) *Notice before repossession, foreclosure, or acceleration.*

(1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outsanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as de-

scribed above. The debtor is not entitled to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

TO: _____

DATE: _____, 19_____

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor _____

_____

Account number, if any _____

Brief identification of credit transaction _____

_____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. You default consists of: _____ Describe default alleged _____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

If you have any questions, write (the creditor) _____ at the above address or call (creditor's designated employee) _____ at (telephone number) _____ between the hours of _____ and _____ on (state days of week) _____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-584

IN THE

Supreme Court of the United States

October Term, 1985

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,
Petitioners,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT GENERAL ELECTRIC CREDIT CORPORATION IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether the specific language of the General Electric Credit Corporation contract, which the *en banc* court of appeals read as preserving the debtor's right to notice of right to cure in unambiguous and mandatory language, qualifies for federal preemption?

2. Whether the Federal Home Loan Bank Board's determination in its regulations and interpretations that a financing contract need not describe a specific right to notice of right to cure to qualify for preemption of state usury laws is demonstrably irrational?

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IN THE

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October Term, 1985

No. 85-584

JACK GRANT, JR., EVELYN H. GRANT,
and all other persons similarly situated,
Petitioners,

v.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT GENERAL ELECTRIC CREDIT CORPORATION IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

On July 8, 1985, the *en banc* United States Court of Appeals for the Eleventh Circuit ruled on the entitlement of two mobile home financing contracts to federal preemption of Georgia usury laws under the Depository Institutions Deregulation and Monetary Control Act of 1980[1] and its regulations.[2] The *en banc* court's holdings turned on the specific language of the respective contracts. In the present class action, *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir. 1985), the *en banc* court of appeals decided that the language of the General Electric Credit Corporation ("GECC") contract was consistent with the Preemption Act and Regulations and therefore was entitled to federal preemption. Specifically, the *en banc* court found that the GECC contract preserved in "clear, mandatory" language the regulatory requirement that the debtor be given notice of right to cure default before GECC could accelerate the debt. *Id.* at 1409.

In *Quiller v. Barclays American/Credit, Inc.*, the *en banc* court held that Barclays was not entitled to preemption because the different contract language there contained "affirmative misrepresentations" of the debtor's rights. *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1072 (11th Cir. 1984), *reinstated on rehearing en banc*, 764 F.2d 1400 (11th Cir. 1985) (en banc), *petition for cert. filed*, No. 85-541 (Sept. 27, 1985). Thus, the decisions in *Quiller* and *Grant* rest upon the application of consistent legal principles to two different contracts.

Three purported class actions involving the Preemption Act were filed by the attorneys prosecuting this case. They were *Grant v. GECC*, *Quiller v. Barclays American/Credit, Inc.* and *Moyer v. Citicorp Homeowners, Inc.* The district court dis-

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[1] Pub. L. No. 96-221, § 501(c), 94 Stat. 161, codified at 12 U.S.C. § 1735f-7 note (1982) ("Preemption Act").

[2] 12 C.F.R. § 590 (1985) (the "Regulations").

posed of each of these cases on its specific form of contract and facts, ruling that GECC and Barclays were entitled to preemption but Citicorp was not.[3]

On appeal, a panel of the court of appeals construed the specific language of the GECC and Barclays contracts. After deciding that § 590.4(h) of the Regulations requires that a notice of right to cure default must actually be given before taking any action to accelerate, foreclose or repossess but need not be stated in the contract, the court held that a creditor can nevertheless lose the benefit of preemption if express provisions of the contract are affirmatively misleading about the debtor's right to notice. *Quiller*, 727 F.2d at 1071; *Grant v. General Electric Credit Corp.*, 727 F.2d 1073, 1074 (11th Cir. 1984), *rev'd on rehearing en banc*, 764 F.2d 1404 (11th Cir. 1985) (en banc). Applying this test to the particular contracts, the panel found both the GECC and Barclays contracts to be deficient.

On rehearing, the *en banc* court of appeals reconsidered the panel's reading of the contracts in *Grant* and *Quiller*. The *en banc* court rejected the *Grant* panel's interpretation of the specific language of the GECC contract and held that the contract was entitled to preemption, but it reinstated the *Quiller* panel opinion. The difference between the Grant *en banc* and panel opinions was the reading of one sentence in the GECC contract. That sentence provides:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the FINANCE CHARGE designated as Time Price Differential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right*. (Emphasis added).

---

[3] The *Moyer* case is now on appeal to the Eleventh Circuit. *Moyer v. Citicorp Homeowners, Inc.*, No. 84-8166 (11th Cir. filed Feb. 27, 1984).

The *en banc* court read this sentence as "unambiguously inform[ing] the debtor that he or she 'shall be given notice of right to cure default' before 'seller is permitted' to exercise its right to accelerate." *Grant*, 764 F.2d at 1406.

In their Petition for Writ of Certiorari, petitioners reassert the same arguments that the district court and the *en banc* court of appeals rejected below. These arguments mischaracterize the GECC contract language and misstate the requirements of the Preemption Act and Regulations.

GECC does not question the duty to provide debtors proper notice of right to cure at the times required by the Regulations in order to qualify for preemption. Indeed, petitioners do not and cannot allege that GECC failed to provide the proper notice in violation of the Preemption Act or Regulations. Nor do they allege any violation of any other applicable federal consumer legislation. They allege no injury or actual damage.

Instead, petitioners urge a twisted reading of the GECC contract contrary to general principles of contract law. They seek under Georgia usury law an injunction against the collection of any finance charges and affirmative recovery of punitive damages of the double the finance charge for all class members.

REASONS FOR DENYING THE WRIT

Petitioners' claims are particularly inappropriate for review on a writ of certiorari. First, petitioners ask this Court to overturn an *en banc* court's reading of a single sentence in a specific contract. Second, petitioners advance a construction of the Preemption Act and Regulations that is contrary to that of the agency responsible for the administration of the preemption framework and every judge who has examined the issue. Neither of these arguments has any merit or raises an important issue of general applicability to justify review by this Court.

Simply stated, petitioners have pursued this action with the hope of obtaining a windfall punitive remedy on a class basis even though all of their rights have been preserved by GECC. They have not and cannot allege any misconduct by GECC or any actual damage.

I.
CERTIORARI IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS' RULING WAS A CASE-SPECIFIC INTERPRETATION OF A SINGLE SENTENCE IN THE GECC CONTRACT.

The *en banc* court of appeals correctly ruled that the specific language of the GECC contract is consistent with the Preemption Act and Regulations regarding the right to notice of right to cure. The court, under established principles of contract construction, gave effect to a proviso clause that required that notice of right to cure be given before the creditor could accelerate the debt. Petitioners ask this Court to grant certiorari to engage in construction of this single sentence in the GECC contract. The question of the proper interpretation of a single sentence in a specific contract does not raise an important issue of general applicability meriting this Court's review.

A. Under Eleventh Circuit Authority, Entitlement to Preemption Depends Upon Analysis of the Facts Relating to the Transaction and the Specific Contract Language.

Both the *Quiller* and *Grant* cases adopt the same, fact-determinative standard for establishing federal preemption of state usury laws in mobile home financing transactions. The court of appeals concluded that the requirement of a notice of right to cure in § 590.4(h) of the Regulations was a limitation on creditor's actions upon default and did not require specific disclosure in the contract of the right to cure. *Quiller*, 727 F.2d at 1070. Under this holding, entitlement to preemption turns on the particular *conduct* of the creditor in providing notice

upon default. In this case, however, "there is no contention that notices sent to the Grants failed to notify them of the 30-day grace period." *Grant*, 764 F.2d at 1407. In fact, GECC sent petitioners the prescribed notice of right to cure when petitioners defaulted and petitioners cured the default within the notice period.[4] (R.118).

The court of appeals further held that a contract need not contain express terms describing the notice of right to cure, but a creditor is not entitled to preemption if the financing agreement contains express provisions that affirmatively misrepresent the right to cure guaranteed by the Preemption Act or Regulations. *Grant*, 764 F.2d at 1405; *Quiller*, 727 F.2d at 1072. Determination of this issue turns on the specific language of the financing contract. The language-specific nature of this test is demonstrated by the *en banc* court of appeals' conclusion that the GECC contract satisfies this test but the Barclays contract language does not.

B. The GECC Contract Preserves the Right to Notice in Unambiguous and Mandatory Language.

The Regulations implement and preserve the right to notice of right to cure default. Specifically, § 590.4(h)(1) provides that a creditor may take "no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation until 30 days after the creditor sends the debtor a notice of default" explaining the right to cure.

The GECC contract is consistent with the right to notice contained in the Regulations. It informs the debtor of the right to receive notice of right to cure before GECC may accelerate the debt. The contract sentence provides:

---

[4] Petitioners' efforts to impugn the conduct of GECC by a multi-page quotation (at pp. 7-9 of the Petition) to the record of a case not involving GECC are disingenuous and irrelevant.

> In the event of Buyer's default in payment when due, *Seller may declare immediately due and payable any and all installments due or to become due hereunder*, less the unearned portion of that part of the FINANCE CHARGE designated as the Time Price Differential calculated by the Pro-Rata Method *provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right*. (Emphasis added).

This sentence clearly requires GECC to give proper notice of right to cure as a *condition precedent* to the right of GECC to declare acceleration of (i.e., immediately due and payable) the principal and earned finance charge. The notice that GECC must (and did) give allows petitioners to cure default by payment of any past due installment and applicable late fees. Only if petitioners did not cure default could GECC then properly declare acceleration of the debt. The course of conduct described in this sentence is therefore precisely consistent with the course of conduct required by the Regulations.

Petitioners ask that this Court review this case to adopt a strained and incorrect reading of this particular sentence. They attempt to ignore the proviso clause, which clause is effective and preserves the right to notice under the basic principles of contract law that govern the interpretation of this contract. *See, e.g., Bragg v. Household Finance Corp.*, 140 Ga. App. 75, 78, 230 S.E.2d 55, 57 (1976) (giving effect to contract limitations on creditor's right to accelerate); *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465, 469 (5th Cir. 1968) (proviso clause must be given effect).

The *en banc* court of appeals correctly rejected petitioners' inaccurate reading of this sentence. The court ruled that

> [t]he GECC contract's qualifying clause, which is cast in mandatory terms, unambiguously informs the debtor that he or she "shall be given notice of right to cure default"

> before "seller is permitted" to exercise its right to accelerate.

Grant, 764 F.2d at 1406.

In contrast to the language of the Barclays contract in *Quiller*, which the court read to misrepresent the right to notice, the court concluded that the right to accelerate in the GECC contract was "expressly conditioned in clear, mandatory terms upon the debtor's receipt of notice of right to cure a default prior to acceleration." *Grant*, 764 F.2d at 1409. The GECC contract is therefore fully consistent with the Preemption Act and Regulations.

C. The *Grant* and *Quiller* Cases Apply Consistent Legal Principles to Different Contract Language.

Petitioners' contention that a conflict exists between the *en banc* Eleventh Circuit opinions in *Grant* and *Quiller* is expressly belied by the opinions themselves. The *Grant* and *Quiller* cases applied the same legal standard to the distinct terms of different contracts. The court of appeals found the GECC contract to "differ significantly" from the contract in *Quiller*. The court concluded:

> In sum, the affirmative misrepresentations of the debtor's federal statutory guarantees that existed in the agreement in *Quiller* are not present in the GECC contract.

Grant, 764 F.2d at 1409. Each case was therefore decided on its own specific contract language.

II.
CERTIORARI IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS AGREED WITH THE BANK BOARD'S INTERPRETATION OF THE PREEMPTION ACT AND REGULATIONS CONSISTENT WITH *FORD MOTOR CREDIT CO. V. MILHOLLIN.*

Petitioners' contention that the Preemption Act requires a specific contractual recitation of the right to notice is not worthy of review on certiorari. First, the plain meaning of the Preemption Act and Regulations, exactly as interpreted by the Bank Board and every judge on the court of appeals, is that no such disclosure in the contract is required. Second, petitioners' analysis fails to acknowledge the deference to the Bank Board's interpretation of the Preemption Act and Regulations required under *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).

A. The Plain Meaning of the Preemption Act and Regulations Is that No Specific Disclosure in the Contract of the Right to Notice is Required.

The Preemption Act delegates to the Bank Board the power to regulate the entire transaction, from contract through notice of default and right to cure. The Preemption Act provides that state usury limits are not preempted on a residential manufactured home credit transaction

> unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions prescribed by the Federal Home Loan Bank Board. *Such regulations* shall—
>
> * * *
>
> (2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances).

12 U.S.C. § 1735f-7 note, § 501(c) (1982) (emphasis added).

Thus, the Preemption Act does not require that the credit contract contain any disclosure of the right to cure default. Congress actually directed that the Regulations require a 30-day notice of right to cure after default prior to any action to repossess or foreclose, but gave no direction on how to implement this notice. Congress delegated this decision to the Bank Board.

In response to this directive, the Bank Board's Regulations enforce the right to notice by establishing the precise terms and conditions of the notice of right to cure and by requiring creditors to send this notice form to debtors before taking action to repossess, foreclose or accelerate. The Regulations provide:

> (h) *Notice before repossession, foreclosure or acceleration.*
>
> (1) Except in the case of abandonment or other extreme circumstances, *no action* to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, *may be taken* against the debtor until 30 days after the *creditor sends* the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. *Such notice shall be sent* by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, *the creditor shall again give notice* as described above. The debtor is not entitled to notice of default more than twice in any one-year period.
>
> (2) [Text of the required notice form is attached as Appendix B.]

12 C.F.R. § 590.4(h) (1985) (Emphasis added).

The operative language addresses the *conduct* of the creditor: "no action . . . may be taken"; "creditor sends"; "such no-

tice shall be sent"; "the creditor shall again give notice." In contrast, the terms of the contract relating to the right to cure are not regulated.

Over five months before this case was filed, the General Counsel of the Bank Board confirmed that the Regulations require only that the creditor actually provide the debtor the prescribed 30-day notice. Reviewing the exact GECC form contract at issue, the General Counsel concluded that no disclosure in the GECC contract of the right to notice was required to qualify for preemption. Fed. Banking L. Rep. (CCH) ¶ 83,027 (Oct. 28, 1982) (attached as Appendix A).

The District Court, the Eleventh Circuit and the Bank Board have uniformly taken the position that the Regulations do not require that the contract contain a specific recitation of the debtor's right to receive notice of right to cure default.[5]

> The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves.

Quiller, 727 F.2d at 1070 (emphasis added).

B. The Court of Appeals Correctly Invoked the *Milhollin* Rule of Deference and Concluded that the Agency's Interpretation Was Not Demonstrably Irrational.

The Bank Board and all courts below unanimously reject Petitioners' continued assertion that the Preemption Act and the Regulations require the contract to disclose the right to notice of right to cure default. These authorities interpret the Act

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[5] Petitioners incorrectly contend that the right to notice must be specified in the contract for such right to exist. The Regulations create that right to notice, and the Preemption Act and Regulations protect that right irrespective of the absence of such right under state law. Under the Regulations, a creditor who fails to give proper notice is denied preemption and is subject to state usury penalties.

and Regulations to require the creditor to give the 30-day notice of right to cure at the appropriate time, when a default actually occurs, *prior to* taking action to accelerate, repossess or foreclose. There is no conflict on this issue either between the judicial and executive branches or between the *Grant* and *Quiller* opinions.

Under the rule of deference of *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the position of the Bank Board, embodied in its Regulations and its own interpretation of those Regulations, is entitled to great weight in all courts and "unless demonstrably irrational, . . . should be dispositive." *Id.* at 565. *Accord Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981); *see Blanding v. DuBose*, 454 U.S. 393 (1982). Petitioners totally ignore and fail to cite this fundamental rule of deference articulated by this Court.

The *Milhollin* rule was recognized and adhered to by the court of appeals and should be dispositive on this issue. The Court noted that:

> Our construction of regulation 590.4(h) and the statute is consistent with the Board's own interpretation. . . . Since the agency's view of its own regulation and the statute it oversees is not "demonstrably irrational," we should give great weight to its interpretation. [citing *Milhollin*].

Quiller, 727 F.2d at 1071.

The court of appeals made its own independent finding confirming that the Preemption Act and the Regulations do not require notice of right to cure in the contract. *Id.* at 1070. The court of appeals, on a step by step analysis, approved without reservation the logic and validity of the Bank Board position. There is no suggestion that the Bank Board's position is demonstrably irrational.

Petitioners seek to second guess the Bank Board's Regulations and interpretations without reference to the appropriate

standard of deference. To merit relief, petitioners must show that the position of the Bank Board, as confirmed by the step by step analysis of the court of appeals, is "demonstrably irrational." Since there appears no justification for concluding that the Bank Board's position is demonstrably irrational, certiorari should not be granted.

III.
CERTIORARI IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS FULLY IMPLEMENTED THE PURPOSES OF THE PREEMPTION ACT.

The Preemption Act was enacted during a time of extremely high interest rates and low state usury limits.[6] Its main purpose was to ensure that mortgage funds would be available in those states where usury limits were below market rates, and thereby to facilitate a national housing policy and the functioning of the national secondary market in mortgage lending. S. Rep. No. 368, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 254-55. Congress also intended for certain consumer rights to be provided where creditors chose to invoke preemption of restrictive usury laws. These goals of the Act were fully satisfied in the subject transaction and were fully implemented by the court of appeals.

Petitioners have not — and cannot — show this Court that they have been denied any rights or benefits which Congress intended to convey under the Preemption Act. Petitioners have recited in their briefs numerous alleged conduct violations by other creditors, *e.g.*, wrongful repossession, wrongful notice. These recitations are in sharp contrast to the facts in this case and point up the lack of merit in Petitioners' position. *These recitations are totally unrelated to any conduct of*

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[6] At the time the Grant contract was executed, the maximum legal rate under applicable Georgia law was 10% "add-on" (14.84% per annum for a 15 year contract), but the prime rate was 17%. *Wall Street Journal*, Feb. 23, 1982, at 45, col. 3.

GECC. Indeed, Petitioners have not alleged any conduct of GECC that in any way violates the Act or Regulations; they have not alleged that they have been misled in any respect by the GECC contract; they cannot allege that they have been harmed or injured by the GECC transaction. Petitioners do seek to have this Court take this case to interpret one sentence in the GECC contract differently than the Bank Board and the Court of Appeals so that they might receive a windfall.

Furthermore, Petitioners cannot show that the ruling of the Court of Appeals in any way infringes upon the prerogatives of the State of Georgia in the area of usury. The Georgia General Assembly has abandoned the usury limits and forfeiture provisions upon which Petitioners rely. A law repealing the interest rate limits and penalty provisions of the Georgia Motor Vehicle Sales Finance Act invoked by petitioners was passed before the filing of this action, but became effective four days after this action was filed. The statute adopted as a matter of state law the consumer protections of the Preemption Act with strictly limited penalties and a prohibition of class actions. 1983 Ga. Laws 1146, O.C.G.A. § 7-4-2 *et seq.* (Michie Supp. 1985). In view of recent case law indicating that the Georgia General Assembly's repeal of usury limits has retroactive effect, *see Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906 (1984), the remedies sought here are inconsistent with the public policy of Georgia.

CONCLUSION

The Petition does not raise an important issue of federal law or seek to resolve a conflict in the lower courts or otherwise present an issue which is appropriate for certiorari under the Supreme Court Rules. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Federal Home Loan Bank Board General Counsel. October 28, 1982. Interpreting 12 C.F.R. § 590.4 [Published at Fed. Banking L. Rep. ¶ 83,027]

This responds to your letter of October 7 requesting an interpretation of Board regulation section 590.4(h) (12 C.F.R. § 590.4(h) (1982)), which contains consumer protection requirements relating to the financing of manufactured homes and preempts state usury laws if those requirements are met. The sole issue presented by your letter is whether section 590.4(h) requires that a manufactured home credit agreement recite the purchaser's right to thirty days' notice as a condition of preemption of state usury laws.

Paragraph (h)(1) of section 590.4 states, in relevant part:

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the obligation may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in subparagraph (h)(2) of this section.

This requirement refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements (Depository Institutions Deregulation and Monetary Control Act of 1980. Pub. L. No. 96-221, § 501, 94 Stat. 161.63 (1980)) expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraph (d) (prepayment without penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4. In light of

these considerations, it is the view of this Office that section 590.4(h) does not require that the terms of a manufactured home credit sale agreement recite the purchaser's right to thirty days' notice of acceleration or repossession.

Please feel free to contact this Office if you should have any further questions.

APPENDIX B

§ 590.4(h)(2) NOTICE FORM

TO: _____

DATE: _____, 19____

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor _____

_____

Account number, if any _____

Brief identification of credit transaction _____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice. If you correct the default, you may continue with the contract as though you did not default. Your default consists of:

Describe default alleged _____

_____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

_____

If you have any questions, write (the creditor) _____ at the above address or call (creditor's designated employee) _____ at (telephone number) _____ between the hours of _____ and _____ on (state days of week) _____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

APPENDIX C

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of the parent companies, subsidiaries and affiliates of General Electric Credit Corporation and the General Electric Company.

ARGENTINA

General Electric Argentina Sociedad Anonima
SADE Sociedad Anonima Constructora, Commercial, Industrial, Financiera, Inmobiliaria y de Mandatos

AUSTRALIA

Australian General Electric Finance Pty. Limited
Australian General Electric Limited
Australian General Electric Properties Limited
Australian General Electric (Sales) Limited
Australian General Electric Trading Pty. Limited
Australian Metallurgical Coal Pty. Ltd.
Bunbury Rewinds Pty. Limited
Central Queensland Coal Associates
Electrical Appliances of Australia Pty. Limited
Endeavour Minerals N.L.
F. R. Tulk & Co. Pty. Limited
General Electric—Goninan Engineering Services Limited
General Electric Information Services Pty. Limited
General Electric Mobile Radio Limited
General Electric Plastics (Australia) Pty. Ltd.
General Electric-Rickard Limited
Goldfields Rewinds Pty. Limited
Goldsworthy Mining Limited
Hay Point Services Pty. Ltd.
Jones and Rickard (Pty.) Limited
McCamey Iron Ore Associates
McCamey Mining Limited
Mount Goldsworthy Mining Associates
Rank Electric Housewares Pty. Ltd.

Rank Major Appliances Pty. Ltd.
S.I. Products (Australasia) Proprietary Limited
Terotola Pty. Ltd.
Utah Beta Pty. Limited (Inactive)
Utah Metals and Minerals Pty. Ltd.

AUSTRIA

General Electric Technical Services GmbH
"General Electric" Informations-Service GmbH
Carboloy GmbH

BAHRAIN

Middle East Engineering Limited

BELGIUM

S.A. General Electric Information Services N.V.

BERMUDA

Dahlia Company Limited

BRAZIL

Banco Brasileiro de Investimentos Ipiranga S.A. (In liquidation)
General Electric do Brasil S.A.
General Electric do Nordeste S.A.—Productos Eletricos
Inducon do Brasil, Capacitores S.A.
Mineracao Marex Ltda.
SADE-MERVAL S.C.
Sade Sul Americana de Engenharia S.A.
Samarco Mineracao S.A.
Storno do Brasil-Industria e Comercio de Radio Communicadoes, Ltda. (Inactive)
Tivoli Comercia e Participacao Ltda.
UMON-Engenharia de Montagem Ltda.

CANADA

Amalgamated Electric Corporation, Limited

Argonaut Construction Co. Ltd.
Buell Canada, Ltd.
Camco Inc.
Canadian General Electric Company Limited
Canadian General Electric International Limited
Canadian Nuclear Equipment Suppliers Limited
Dominion Engineering Company Limited
Dominion Engineering Works Limited
Genelcan Limited
Genelcan Realty Limited
Genelcom Limited
General Electric Medical Systems Limited
Gescan Limited
Installations Benjamin Inc.
Montreal Armature Company Limited
Riverdale Park, Ltd.
Rupert Inlet Copper Mines Ltd.
Services 5/81 Notre-Dame Inc. (Inactive)
Sheafer-Townsend Limited
W. L. Stevens Ltd.
Widney Wellk Servicing (1971) Ltd.
114746 Canada Inc.

CHILE

Electromat S.A. Fabrica de Materiales Electricos
Propriedades Mineras Limitada

CHINA

The China Car and Foundry Company Limited

COLOMBIA

Compresores Andinos, S.A.
Consorcio Distral-SADE Ltda.
General Electric de Colombia, S.A.
Sud Americana de Electrification S.A.

CUBA

Bombillos General Electric de Cuba, S.A.
Genelectric Rayos-X, S.A.
General Electric Cubana, S.A.
Manufacturera General Electric, S.A.

DENMARK

General Electric Nuclear Medical ApS
Isua Minekompagni I/S
Storno A/S

DOMINICAN REPUBLIC

Sade Dominicana S.A.

ECUADOR

Sadelmi Ecuatoriana S.A.

FRANCE

Calma et Cie
CFM International, S.A.
Fabrications Mecaniques de l'Atlantique S.A.
General Electric Information Services S.A.
General Electric Plastics S.A.R.L.
Intersil Datel, S.A.R.L.
L'Eclairage Technique, S.A.
SNEF Electro Mecanique (S.E.M.)
Storno S.A.
W.Q.S. France S.A.R.L.

GERMANY

Calma GmbH
General Electric Informations-Service GmbH
General Electric Plastics GmbH
Intersil Datel GmbH
Quarzglas GmbH
Specialty Materials Europe

Storno Electronic GmbH
Unterstutzungskasse der Deutschen General Electric Gesellschaften GmbH
Westdeutsche Quarzschmelze GmbH

HONG KONG

Electronic Industry Limited
Intersil Datel (Hong Kong) Ltd.

INDIA

Elpro International Limited
IGE (India) Limited
Intersil (India) Limited

INDONESIA

International General Electric, Company Inc. of Java
P. T. Arutmin Indonesia
P. T. Tropic Endeavour Indonesia
P. T. Utah Indonesia

IRAN

Iran Electrical and Mechanical Services Company
Iranian Compressor Manufacturing Company
Pars Appliance Manufacturing Company

IRELAND

Atlanta Projects Company, Ltd.
ECCO, Limited
Guiness Peat Aviation Ltd.
Intersil Datel (Ireland) Ltd.
The E. I. Company Limited

ITALY

Calma Italia S.r.L.
Carboloy S.p.A.
CGE-Compagnia Generale di Elettricita S.p.A.
CGE-Compagnia Generale Elettromeccanica S.p.A.

General Electric Information Services S.p.A.
General Electric Plastics Italia S.p.A.
SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.
Societa Nazionale delle Officine di Savigliano S.p.A.
TAD Elaborazione Dati S.p.A.
Turbomotori Internazionale S.p.A.

JAPAN

Asahi Diamond Industrial Company, Limited
Chemico Engineering Co., Ltd.
Datel Kabushiki Kaisha
Drive System Company, Ltd.
Engineering Plastics, Ltd.
Eye Lighting Systems Corporation
GEM Polymers Ltd.
General Electric Japan, Ltd.
General Electric (U.S.A.) Industrial Automation, Ltd.
Information Services International-Dentsu, Ltd.
Japan Nuclear Fuel Company, Limited
Nippon ESGE K.K.
Specialty Materials Pacific, Inc.
Toshiba Corporation
Toshiba Electronic Systems Co. Ltd.
Toshiba Silicone Company, Ltd.
Yokogawa Medical Systems, Ltd.

KENYA

General Electric (Kenya) Ltd.

LIBERIA

Berryessa Inc.
Bulkers Limited
Marcona Carriers, Ltd.
Marcona Conveyor Corporation
Orco Shipping Corporation

Shasta Inc.
Utah Shippers, Inc.
Utah Transport Inc.

MALAYSIA

General Electric (USA) Audio Malaysia Sdn. Bhd.
General Electric (USA) Television Sdn. Bhd.
General Electric (USA) Malaysian Appliance Components Sdn. Bhd.
Watt & Akkermans Sdn. Bhd.

MEXICO

Aparatos Electricos de Acuna, S.A. de C.V.
CCC de Mexico, S.A. de C.V.
Capacitores Componentes de Mexico, S.A. de C.V.
Compania Armadora, S.A. de C.V.
Compania Utah, S.A. de C.V.
Diesel Industrial y Tractiva S.A. de C.V.
ECOM de Mexico, S.A. de C.V.
Electroaparatos de Mexico S.A. de C.V.
Electro Componentes de Mexico, S.A. de C.V.
General Electric de Mexico, S.A. de C.V.
Generacion Electrica Nacional S.A. de C.V.
Industrial Controls de Mexico, S.A. de C.V.
Productos de Control, S.A. de C.V.
Radio Componentes de Mexico, S.A. de C.V.
Sistemas de Baterias, S.A. de. C.V.
Sociedad de Motores Domesticos, S.A. de C.V.

NETHERLANDS

General Electric Credit International, N.V.
General Electric Information Services B.V.
General Electric Plastics B.V.
Industrieel Bezit Noordland B.V.
Specialty Materials International B.V.
Van Wijnsberge B.V.

NEW ZEALAND

Donald Brown & Co. Ltd.
General Electric Plastics (New Zealand) Pty. Ltd.
New Zealand General Electric Company Limited
Rank Appliances New Zealand Limited
Waipipi Iron Sands Limited

NIGERIA

American General Electric (Nigeria) Ltd.
IGE of Nigeria Ltd.
Sadelmi Nigeria Limited

NORWAY

General Electric (USA) Information Services A/S
Medirad Medical AS

PANAMA

Marcona International, S.A.
Private Investment Company for Asia S.A.
Utah Carriers S.A.

PHILIPPINES

Agricultural Needs, Inc.
General Electric Philippines, Inc.
General Electric Philippines Meter and Instrument Co., Inc.
Philippine Appliance Corporation
Philippine Electrical Manufacturing Company
Philippine Glass Bulbs, Inc.
Philippine Electric Corporation
Pinagkaisa Realty Corporation

PORTUGAL

General Electric Portuguesa, S.A.R.L.

PUERTO RICO

General Electric Anasco, Inc.

General Electric Circuit Breakers, Inc.
General Electric Controls, Inc.
General Electric Credit Corporation of Puerto Rico
General Electric Credit and Leasing Corporation of Puerto Rico
General Electric del Caribe, Inc.
General Electric Energy Management Systems, Inc.
General Electric Fuses, Inc.
General Electric GEPOL, Inc.
General Electric Indicating Devices, Inc.
General Electric Industrial Products, Inc.
General Electric Low Voltage Products, Inc.
General Electric Pilot Devices, Inc.
General Electric Plating, Inc.
General Electric Protective Devices, Inc.
General Electric Reconstruction Industrial Corporation
Industrial Control of Puerto Rico
International General Electric Puerto Rico, Inc.
Power Breakers, Inc.
Precision Protective Devices, Inc.
Protective Relays, Inc.
Ventas de General Electric Controles, Inc.
Wiring Devices of Puerto Rico, Inc.

SAUDI ARABIA

Jamjoom Electrical Distribution Assemblies Company Ltd.
Middle East Engineering Limited Saudi Arabia
SADELMI Shaker Tamimi Construction Co. Ltd.
Saudi American General Electric Company Limited
Shaker Electro-Mechanical Service Corp., Ltd.

SINGAPORE

Electronic Components of General Electric (USA) Private Limited
General Electric (U.S.A.) Applicance Components Private Limited

General Electric (U.S.A.) Aviation Service Operation Private Limited
General Electric (U.S.A.) Consumer Electronics Private Limited
General Electric (U.S.A.) Controls Pte. Ltd.
General Electric (U.S.A.) Hermetic Motor Operation Private Limited
General Electric (U.S.A.) Housewares Private Limited
General Electric (U.S.A.) Television and Appliance Private Limited
Intersil Singapore (Pte.) Limited
Watt & Akkermans Pte. Ltd.

SOUTH AFRICA

Ajax Manufacturing Company (Pty.) Ltd.
Allenwest (Cape) (Pty.) Ltd.
Allenwest-GE Manufacturing (Pty.) Ltd.
Allenwest-GE Sales (Pty.) Limited
B-H Electronics (Proprietary) Limited
Charomel Investments (Pty.) Ltd.
Defy Air Conditiones (Pty.) Ltd.
Defy Corporation (Pty.) Limited
Defy Investments (New Castle) (Pty.) Ltd.
Defy Investments Pretoria (Pty.) Ltd.
Defy Sales EP (Pty.) Ltd.
EICSA (Proprietary) Limited
Gaycas (Pty.) Ltd.
General Electric South Africa (Proprietary) Limited (Inactive)
Hartmore Fluorite (Proprietary) Limited
Inkongweni (Pty.) Ltd.
Kenbrick Properties (Pty.) Limited
Lease Air (Pty.) Ltd.
Lot 60-64, Wadeville (Pty.) Ltd.
Lot 135, Edenburg (Pty.) Ltd.
Magnet Wires (Proprietary) Limited
Manchester Property Investments (Pty.) Ltd.

Mit-Ben Property Investments (Pty.) Ltd.
Newcastle Flats (Pty.) Ltd.
Petta Properties (Proprietary) Limited
R&M Electrical Sales (Pty.) Limited
Reid & Mitchell (Pty.) Limited
S.A. Housewares (Pty.) Ltd.
Simplex Electric of South Africa (Pty.) Ltd.
Simplex-GE Lighting (Pty.) Limited
South African General Electric Company (Pty.) Ltd.
Southern Sphere Coal (Proprietary) Limited
Southern Sphere Mining and Development Company (Proprietary) Limited
Tantalite Valley Minerals (Proprietary) Limited
Transage Wire (Pty.) Ltd.
Wireohms South Africa (Pty.) Ltd.

SPAIN

Construcciones Electromecanicas Fierro, S.A.
Construcciones Industriales de Maquinaria e Ingenieria, S.A.
General Electric (USA) Information Services, S.A.
General Electric (USA) Electromedicina, S.A.
Ingeniera Electronica Aplicada, S.A.
International General Electric Company of Spain, S.A.
Sociedad Anonima de Construcciones Electricas de Proteccion
Sociedad Anonima de Ingenieros Contratistas
Sociedad Iberica de Construcciones Electricas

SWAZILAND

General Electric Limited

SWEDEN

General Electric (USA) Information Services AB
International General Electric Aktiebolag AB
Storno AB
Svenska Medirad A.B.

SWITZERLAND

General Electric Information Services AG

TAIWAN

Taiwan Electric Manufacturing Company
United Asia Electric Company

TURKEY

General Electrick Turk Anonim Sirketi

UNITED ARAB EMIRATES

Middle East Engineering Limited — U.A.E.

UNITED KINGDOM

Allenwest Limited
Allenwest EAC Ltd.
Calma UK Ltd.
Cange Limited
Carboloy Ltd.
Cema (U.K.) Limited
Clang Ltd.
Claytat Limited
DMR Electro Magnets Limited
Dynamo & Motor Repairs Limited
Dynamo & Motor Repairs (South Wales) Limited
Dynamo & Motor Repairs (Stockton) Limited
Dynamo & Motor Repairs (Tyne and Wear) Limited
Dynamo & Motor Repairs (Wembley) Limited
Engineering Polymers Ltd.
GEISCO Limited
Group Four Electronics Limited (Inactive)
Hackbridge-Faraday Electrics Limited
International General Electric Company of New York Limited
Intersil Atel (U.K.) Limited
N.C. Joseph Limited
J.W. Morgan & Son, Limited (Inactive)

Optech Power Systems, Ltd.
Potters Electrical Repair Company Limited (Inactive)
Process Control Gear Limited
Reinsurance Systems Limited
Sadelmi Limited
Simplex Conduits Limited
Simplex Electric Limited
Simplex (FAL) Ltd.
Simplex (Fans & Ballasts) Limited
Simplex-GE General Pension Trustees Limited
Simplex-GE Holdings Limited
Simplex-GE Manufacturing Limited
Simplex-GE Limited
Simplex-GE Staff Pension Trustees Limited
Simplex (Lighting) Ltd.
Simplex (Power Centre) Ltd.
Simplex (Wiring Devices) Ltd.
Simplex Wiring Systems, Limited
Smithlite Limited
Sona Limited
Storno Limited
The Benjamin Electric Limited
The Electrical Apparatus Company Limited
The Reason Manufacturing Co. Limited
Tyne & Wear Electrical Company Limited
Utah Minerals (U.K.) Limited
Wallacetown Control Systems Limited
Wallacetown Engineering Company Ltd.
Wallacetown Properties Limited

UNITED STATES

Acquisition Funding Corporation
Adobe Canyon Corporation
Aircraft Services Corporation
Alton Minerals Inc.
Alton Mining Corporation

American Well Servicing Company
Amwest Associates
AMI Mortgage Insurance Company
AMIC Title Insurance Company
A.P. - GERECCO Ltd.
Arvada-Fremont Developers
Associates for Management Services, Inc.
Atlantic Plant Maintenance, Inc.
Baconsfield Associates
Banking Systems Incorporated
Biological Energy Corporation
Calma Company
Calma Company of Virginia
Calmadisc, Inc.
Campus Drive Associates
Castle Oaks Corporation
CBI Nuclear Company
Cedar Creek Associates
CFM International, Inc.
Chemico Air Pollution Control Corporation
Chemico Engineering Co., Ltd.
Claremont Management Co.
Clinton Employment Center Associates
CMC Insurance Agency, Inc.
Commonwealth, Inc.
Comwe, Inc.
Cool Water Coal Gasification Program
Cornell Center Associates
Creative Credit Services, Inc.
Cyprus Pima Associates
Cyprus Pima Mining Company
Diamond Oaks Associates
Diamond Oaks Corporation
Dobson Village I
Dominion Terminal Associates
Dunwoody Place Associates

EAPD Bayou Cogeneration, Inc.
East Erie Commercial Railroad
Ebbert's Homes VI
Ebbert's Homes VII
ECOGE/U.S., Inc.
Employer's Reinsurance Corporation
Evansville Cable TV, Inc.
Executive Center West Associates
Feather River Coal Company
FGIC Corporation
Fremont Coal Company
Fremont Development Inc.
Full Service Leasing Corporation
GE Interactive Graphics, Inc.
GECC Financial Corporation
GECC Hawaii Leasing Corporation
GEG Associates
Garrison-Petaluma Associates
Genel Company, Inc.
Genel Insurance Services, Inc.
General Electric Asia Capital Corporation
General Electric Broadcasting Company, Inc.
General Electric Broadcasting Company of Colorado, Inc.
General Electric CAE International, Inc.
General Electric Cablevision Corporation
General Electric Ceramics, Inc.
General Electric Credit and Leasing Corporation
General Electric Credit Auto Lease, Inc.
General Electric Credit Corporation
General Electric Credit Corporation of Delaware
General Electric Credit Corporation of Georgia
General Electric Credit Corporation of Tennessee
General Electric Environmental Services, Inc.
General Electric Equity Insurance Corporation
General Electric Financial Services, Inc.
General Electric Credit Corporation

General Electric Credit International, N.V.
Acquisition Funding Corporation
Aircraft Services Corporation
R.C. Chapman Drilling Company, Inc.
Full Service Leasing Corporation
General Electric Credit Corporation of Delaware
General Electric Credit Corporation of Georgia
General Electric Credit Corporation of Puerto Rico
General Electric Credit and Leasing Corporation of Puerto Rico
General Electric Credit Corporation of Tennessee
General Electric Credit and Leasing Corporation
General Electric Credit and Leasing Canada Ltd.
Lone Star Florida Pennsuco, Inc.
General Electric Railcar Services Corporation
General Electric Railcar Services Canada Ltd.
NA Transbulk Canada Limited
Quality Service Railcar Repair Corporation
Seek Systems, Inc.
Transbulk, Inc.
GEVEST Corporation
GECC Financial Corporation
GECC Hawaii Leasing Corporation
Hawaiian American Leasing
Auto and Equipment Leasing Company of Hawaii, Inc.
General Electric Mortgage Corporation
Commonwealth, Inc.
Comwe, Inc.
Genel Insurance Services, Inc.
Metropolitan REIM
Genel Company, Inc.
General Electric Real Estate Syndications, Inc.
General Electric Mortgage Capital Corporation
General Electric Mortgage Insurance Corporation
General Electric Mortgage Insurance Corp. of Florida, Inc.

General Electric Mortgage Securities Corporation
General Electric Mortgage Insurance Services, Inc.
General Electric Mortgage Insurance Corporation of North Carolina
General Electric Mortgage Insurance Corporation of California
General Electric Equity Insurance Corporation
General Electric Guaranty Insurance Corporation
General Electric Credit Equities, Inc.
Creative Credit Services, Inc.
General Electric Credit Auto Lease, Inc.
Puritan Insurance Company
Puritan Lloyd Insurance Company
Puritan Title Insurance Company
Puritan Excess and Surplus Lines Insurance Company
Monogram General Insurance Agency, Inc.
Monogram General Agency of Arkansas, Inc.
Monogram General Agency of California, Inc.
Monogram General Agency of Florida, Inc.
Monogram General Agency of Kentucky, Inc.
Monogram General Agency of Mississippi, Inc.
Monogram General Agency of Montana, Inc.
Monogram General Agency of Nevada, Inc.
Monogram General Agency of North Carolina, Inc.
Monogram General Agency of Ohio, Inc.
Monogram General Agency of South Carolina, Inc.
Monogram General Agency of Texas, Inc.
Monogram General Agency of West Virginia, Inc.
Puritan Life Insurance Company
CMC Insurance Agency, Inc.
Monogram Reinsurance Corporation
Monogram Life Insurance of New York
General Electric Real Estate Equities, Inc.
General Electric Guaranty Insurance Corporation
General Electric Information Services Company
General Electric International Operations Company, Inc.

General Electric International Sales Company
General Electric Investment Corporation
General Electric Mortgage Capital Corporation
General Electric Mortgage Corporation
General Electric Mortgage Insurance Corporation
General Electric Mortgage Insurance Corporation of Florida
General Electric Mortgage Insurance Corporation of North Carolina
General Electric Mortgage Insurance Services, Inc.
General Electric Mortgage Securities Corporation
General Electric Overseas Capital Corporation
General Electric Professional Services Company
General Electric Radio Services Corporation
General Electric Rail Services Corporation
General Electric Real Estate Credit Corporation
    Isla del Sol, Inc.
    Trafalgar Developers of Florida, Inc.
    Trafalgar Community Developers, Inc.
    Trafalgar Credit Corporation
    Trafalgar Realty, Inc.
    Adobe Canyon Corporation
    Claremont Management Company
    Diamond Oaks Corporation
    Fremont Development, Inc.
    Petaluma Center, Inc.
    Ridgeview Management Company
    Rolling Hills Corporation
    Vanderberg Village Development Company
General Electric Real Estate Equities, Inc.
General Electric Real Estate Syndications, Inc.
General Electric Technical Services Company, Inc.
General Electric Trading Company
General Electric Uranium Management Corporation
General Electric Venture Capital Corporation
General Electric Video, Inc.
Genetic Sciences Corporation

L. E. Hawkins Contractors, Inc.
High Voltage Breakers, Inc.
Holiday Pines
Holiday Pines Service Corp.
Homemakers Finance Service, Inc.
Homemakers Loan & Consumer Discount Company
Huntington Glen Associates
Hydraulic Turbines, Inc.
Intersil, Inc.
Intersil International, Inc.
Intersil Systems, Inc.
Isla del Sol, Inc.
KYK, Limited
Kirby Fletcher Stamford, Ltd.
Kramer Capital Corporation
LVO Data Systems, Inc.
Ladd Australia, Inc.
Ladd Bataan, Inc.
Ladd Exploration Company
Ladd Indonesia Inc.
Ladd Italiana S.p.A.
Ladd Mindoro, Inc.
Ladd Overseas Corporation
Ladd Petroleum Corporation
Lake Adair Corporation
LVO 1971 Exploration Program
LVO 1972 Exploration Program
LVO 1972 Exploration Program II
Locke Insulators, Inc.
MRP Software International, Inc.
Management and Technical Services Company
Marcona, Inc. (Delaware)
Marcona (N.Z.) Company
Marcona New Zealand Inc.
Marcona Ocean Industris, Ltd.
Mariposa Mining Company

Marquette Electronics, Inc.
Matewan Minerals Inc.
Metropolitan REIM
Middle East Technical Services Company, Inc.
Midwest Electric Products, Inc.
Minera Utah de Chile Inc.
Minera Utah de Colombia Ltd.
Minera Utah de Peru Inc.
Monogram General Agency of Arkansas, Inc.
Monogram General Agency of Florida, Inc.
Monogram General Agency of Kentucky, Inc.
Monogram General Agency of Mississippi, Inc.
Monogram General Agency of North Carolina, Inc.
Monogram General Agency of South Carolina, Inc.
Monogram General Agency of Texas, Inc.
Monogram General Agency of West Virginia, Inc.
Monogram General Insurance Agency, Inc.
Monogram Reinsurance Corporation
Multi-Craft Installation Services, Inc.
Network Consultants, Inc.
Northern Oaks Associates
Northridge Pointe Associates
Park Place Developers, Ltd.
Parker County Pipeline Company
Pathfinder Mines Corporation
Pellicano Business Center Associates
Pembroke Coal Company
Petaluma Center Inc.
Plastics Realty Corporation
Product Distribution Company
Puritan Excess and Surplus Lines Insurance Company
Puritan Insurance Company
Puritan Life Insurance Company
Puritan Title Insurance Company
Qualified Personnel, Inc.
Quality Railcar Repair Corporation

Ridgeview Management Company
Rolling Hills Corp.
Rolling Hills Ranch
Sadelmi New York, Inc.
San Juan Coal Company
Sierra Coal Company
Software International Corporation
Southern Sphere Holdings Ltd.
Southern Sphere Mining Inc.
Southern Sphere Operations Limited
Springer Mining Company
Structural Dynamics Research Corporation
Tau Epsilon Music, Inc.
Tegas Systems, Inc.
Terzack, Inc.
Trafalgar Community Developers, Inc.
Trafalgar Credit Corporation
Trafalgar Developers of Florida, Inc.
Trafalgar Realty, Inc.
Utah Australia Limited
Utah Construction & Mining Co.
Utah Development Company
Utah Dominion, Inc.
Utah Exploracoes Mineiras (Portugal) Inc.
Utah Exploration Inc.
Utah Far East, Inc.
Utah International Inc.
Utah International Finance Corp.
Utah—Marcona Corporation
Utah Mines Ltd.
Utah Mining Company
Utah Pacific Inc.
VHD Electronics, Inc.
Vandenberg Village Development Company
Victoria Coal Company
Wainoco Appalachian Stamford, Ltd.

Widney Well Servicing (1981) Inc. (Inactive)
Widney Well Servicing (US) Inc.

URUGUAY

General Electric de Uruguay S.A.

VENEZUELA

General Electrid de Venezuela S.A.
Indelec S.A. Industries Electronicas
Manufacturera de Aparatos Domesticos S.A.
Maquinarias Venequip S.A.
Sud Americana de Electrification, S.A.
Terrenos y Maquinarias Termaq S.A.
Terbinas y Mecanica C.A.
Venezolana de Compresores y Motores S.A.
Vidriolux, C.A.

ZAMBIA

Allenwest (Zambia) Limited

ZIMBABWE

Allenwest (Private) Ltd.
General Electric (USA) of Zimbabwe (Private) Ltd.

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,

Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I.

The Purported Interpretation Of The Federal Home Loan Bank Board Has Been Totally Discredited And Is Not Entitled To Deference.

In support of its argument that there is no need for a finance company to include in its contract a provisions concerning a 30-day notice of right to cure, respondent relies on an October 28, 1982 opinion of the Office of the General Counsel of the Federal Home Loan Bank Board (Bank Board) which it argues is entitled to deference under *Milhollin*. At first blush, GECC's

position might appear to have substance.[1] However, GECC has failed to inform this Court of the circumstances surrounding the production of that letter. The letter was specifically solicited by GECC after it had lost a preemption case in Arkansas. (See Appendix A to this Reply). Additionally, the letter is not an official interpretation of the Bank Board but is merely an unofficial opinion of the Office of General Counsel as is clearly shown by Appendix B to this Reply in which the Bank Board stated that it had not "issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221."

The General Counsel's opinion letter relied upon by GECC and which it claims is entitled to deference is also in direct conflict with official positions taken by the Bank Board. In proposing the regulations ultimately promulgated, the Bank Board opined as follows:

> [S]tate usury ceilings may be exceeded by a lender covered by this Act *only if the loan complies with such regulations.*

45 Fed. Reg. 31122 (May 12, 1980) (Emphasis added).

> *The rules prescribe consumer protections which must be included in loans* secured by first lien on mobile homes before such loans are eligible for the state usury law exemption . . .

45 Fed. Reg. 43681 (June 30, 1980) (Emphasis added). In an *amicus curiae* brief filed with the Eleventh Circuit Court of Appeals, the Bank Board stated that:

> Under the Act, state usury limits on loans secured by first liens on residential manufactured homes are preempted

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[1]Perhaps because it did not obtain other opinions from Bank Board counsel to use in defense, GECC offers no response to justify the other defects in its form contract which disqualify it for preemption. These defects are fully discussed in the Petition and will not be set forth again.

> *as long as the loans are made in conformance with the Board's consumer protection regulations* with respect to, *inter alia*, prepayment penalties and *foreclosure notices*, both of which are at issue herein.

Bank Board *amicus curiae* brief before the panel at p. 3. (Emphasis added).

When the October 28, 1982 letter is considered for what it truly is, it should receive no more deference than the argument of any other advocate in this case. It is erroneous for GECC to characterize its solicited opinion as that of the Bank Board itself. The opinion plainly shows that it is the product of the office of general counsel. For example, the October 28, 1982 letter concludes by pointing out that it contains the "view of this office." Indeed, it could not have been anything else as the Bank Board has acknowledged as noted above that there has been no delegation of authority to the office of general counsel to issue interpretations of the Preemption Act or the regulations. Nor do the Bank Board regulations concerning general counsel authorize that office to issue such interpretations. 12 CFR § 500.17. Interpretations by the Bank Board, on the other hand, are those which are given in response to requests to the Secretary of the Board, and are published in the Federal Register. 12 CFR § 590.5.

It is recognized that informal letters or opinions of agency staff members are not binding and are not to be relied upon by the regulated industry. *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). Moreover, this Court recently dealt with the question of deference to an agency in general, and especially to opinions of agency attorneys in the case of *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. ____, 82 L.Ed.2d 107 (1984). This case raised the question of what deference should be given to interpretations of the Glass-Steagall Act by the Federal Reserve Board. Especially pertinent to the present appeal and the attempt by the lenders to elevate the opinions of agency attorneys is the following:

> We also have made clear, however, that deference is not to be a device that emasculates the significance of judicial review. *Judicial deference to an agency's interpretation of a statute 'only sets the framework for judicial analysis; it does not displace it.'* (cits.) *A reviewing court 'must reject administrative constructions* of [a] statute, whether reached by adjudication or rulemaking, *that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'* (cits.)

82 L.Ed. at 113. (Emphasis supplied). Thus, in any other context than TILA, even where the agency interpretation is the product of an open process of adjudication or rule making, courts are not to accept agency opinions that are contrary to statute. This Court went on to point out that even less consideration is given to determinations made by agency counsel, which as in the present case, are often the product of a closed and biased process.

> We previously have stated that *post hoc rationalizations by counsel for agency action are entitled to little deference. 'It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.'*

Id. at 113-114. (Emphasis added).

In conclusion, there are many reasons why this Court should not accept the invitation of GECC to simply acknowledge an opinion of the Bank Board's counsel on the issues in suit and rule for GECC. *Milhollin* is unique to the TILA context.[2] The opinion advanced by GECC is not that of the Bank Board but is a statement solicited *ex parte* by GECC from subordinate officials who were not authorized to make interpretations of the legislation and regulations at issue in this case. Moreover, and most importantly, the opinion is incorrect.

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[2]444 U.S. at 567-568; 15 U.S.C. § 1640(f).

II.

The Issue Of Federal Law Is Important And Is One That Should Be Decided By This Court.

In its response to the Petition for Certiorari, GECC attempts to belittle the importance of the issue before this Court by categorizing it as the mere construction of a single sentence in a contract.[3] The fact that GECC loaded all of its powerful and onerous collection remedies in one sentence of its contract reflects only its skill in drafting a form contract of adhesion. The Grants served discovery on GECC to determine why it failed to comply, but the 12(b)(6) dismissed in the District Court prevented that procedure from continuing. In making its argument of unimportance, GECC downplays the clear intent of Congress in the passage of the Preemption Act which was: in order for a finance company such as GECC to obtain a higher finance charge than that allowed by state law, the borrower was to receive the consumer benefits mandated by Congress.

State laws governing the time-price differential (finance charge) that could be charged on mobile home transactions would only be preempted on the condition that consumer debtors would be guaranteed certain safeguards. See H.Conf.Rept. 96-842, 96th Cong., 2nd Sess. 79, *reprinted* in 1980 *U.S. Code Cong. & Ad.News*, 298, 309. In the case at bar, GECC could only charge unlimited finance charges if the "terms and conditions" of its credit sales contract complied with regulations promulgated by the Bank Board. Preemption Act § 501(c). While the Bank Board was given broad discretion in fashioning those consumer protection regulations, Congress mandated and obviously intended that mobile home purchasers would

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[3]While disparaging the importance of this issue before this Court, the trade organizations representing GECC and other finance companies at the same time have been lobbying Congress to amend the Preemption Act to allow the finance companies to amend their contracts now so as to preempt state laws retroactively. A draft of the proposed amendment is known as S.L.C. Draft No. 089910.415. A hearing on this amendment was held before the Senate Subcommittee on Financial Institutions and Consumer Affairs on November 6, 1985. *The Columbus Enquirer*, Nov. 7, 1985, p. B-1.

have a contractual right to the same notice of default and 30 days in which to cure the default as are granted to conventional home purchasers in Feddie Mac and Fannie Mae uniform notes, mortgages, deeds of trust and deeds to secure debt. H. Conf. Rept., *supra*.

GECC has stated that petitioners cannot allege any misconduct on its part or damages to the class. However, this case was dismissed on a F.R.C.P. 12(b)(6) motion before petitioners had an opportunity to present evidence. The damage to the Grants is that they are paying finance charges of $17,896.50 in excess of that permitted by Georgia law while GECC has failed in preparing its documents to pay the concomitant price for preemption. Thus, the only party receiving a "windfall" is GECC.

GECC mentions on page 13 of its Brief in Opposition to the Petition for Writ of Certiorari that at the time of the Grant contract, the prime rate was "17%." The term "prime rate" is an illusive term. *American National Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. ____, 87 L.Ed.2d 437 (1985). Treasury issues maturing in 1998 were yielding 13.15%. *Wall Street Journal*, February 23, 1982, at 52, Col. 4. The average contract interest rate on conventional first mortgage loans for the purchase of single family homes during the calendar year 1982 was 14.5%. 1985 Statistical Abstract of the United States, 105th Ed., U.S. Dept. of Comm., Bureau of the Census, No. 1329. The Grants were charged a time-price differential which equates to 20.12% simple interest rate over a 15-year term. The implication GECC makes is that it gave purchasers a fair deal and that this Court should not allow state law to operate as the Preemption Act requires. This plea pales when one considers the fact that as of November 23, 1985, after 46 months, the actuarial pay off on the Grants' contract was $24,832.78 while the loan value or wholesale value is $20,395.00. *National Automobile Dealers Association Mobile Home Manufactured Housing Appraisal Guide*, Sept.-Dec. Ed., 1985. Thus, in order for the Grants to sell their trailer, they not only lose their down payment of $4,300.00 plus their paid-in equity, but also

would have to pay someone to assume payments on a depreciating trailer.[4]

However, the issue before this Court should not be the reasonableness of a time-price differential computed at an annual percentage rate of 20.12% over a 15-year period or the plight of the Grants and those similarly situated. The point is GECC did not, on February 23, 1982, pay the price for preemption and thus, cannot now claim preemption from state law, regardless of the reasonableness or unreasonableness of a 15-year rate of 20.12% which for the Grants amounts to a finance charge of $57,546.00 on a trailer with an initial unpaid balance of $26,433.00.

III.

The Claims Of Petitioners Have Not Been Affected By Legislation Enacted In Georgia Subsequent To The Filing Of This Action.

Contrary to the assertions of respondent, this action is not a "usury" claim. The transaction is not a "loan" and there has been no charging of "interest." Petitioners made installment purchases and were charged a time-price differential regulated by Georgia law. *Sumner v. Adel Banking Co.*, 244 Ga. 73, 259 SE2d 32 (1979); *E. Tris Napier Co. v. Trawick*, 164 Ga. 781, 139 SE 552 (1927); *Rigdon v. Walker Sales & Service, Inc.*, 161 Ga. App. 459, 288 SE2d 711 (1982); and *Richardson v. C.I.T.*, 60

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[4]In testimony before Congress in February 1980, the finance companies asked for preemption on the basis that the consumer protections to be required in the Preemption Act would make mobile home financing similar to the financing of conventional homes. February 21, 1980 testimony of the Coordinating Council on Mobile Home Financing before the House Banking, Finance and Urban Affairs Committee at pp. 24-25. Conventional home borrowers have collateral which retains value or appreciates. Throughout the county, high interest conventional home loans have been refinanced at significant savings to borrowers. In contrast, mobile home borrowers such as petitioners are slaves to contracts with the highest long-term interest rates in the country, which contracts are illegal.

Ga. App. 780, 5 SE2d 250 (1939). Thus, the Georgia cases of *Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 SE2d 729 (1985) and *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 SE2d 906 (1984) and their progeny which deal with usury and which follow this Court's decision of *Ewell v. Daggs*, 108 U.S. 143 (1883) are not applicable.[5]

While the Georgia General Assembly did opt-out of the Preemption Act by the enactment of new provisions known as OCGA § 7-4-3, Ga. Laws 1983, p. 1146 at 1149, the Georgia General Assembly indicated that the law should only be given prospective and not retrospective application. OCGA § 7-4-5(b), Ga. Laws 1983, p. 1146 and 1151, provides in part:

> Such liability may be asserted in an individual action only and may not be the subject of a class action; provided, however, this provision shall not apply to any class action pending prior to March 31, 1983.

Obviously, the Georgia General Assembly was aware of these pending class actions at that time and intended that the statute should only be given prospective application. Moreover, in lifting the restriction on the amount of finance charge that could be exacted by a finance company, the Georgia General Assembly stated that "the contract provisions required by subsection (c) of [the Preemption Act]" were to be included in financing documents executed after March 31, 1983. OCGA § 7-4-3(b)(1). Therefore, Georgia has specifically declared that the 30 day notice of right to cure must be included in the contract documents.

In 1985, the Georgia Motor Vehicle Sales Finance Act (GMVSFA) was again specifically amended by providing that a buyer and a seller in a regulated transaction could establish any

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[5]These Georgia cases also specifically turn on the fact that Georgia distinguishes between actions which were filed prior to a change in the law and those which were not. Furthermore, the rationale of *Ewell v. Daggs*, *supra*, may no longer be applicable. *See United States Trust Company of New York v. State of New Jersey*, 431 U.S. 1 (1977).

finance charge agreed upon in writing by the parties where the amount financed was more than $5,000.00. OCGA § 10-1-33(b), H.B. 452, Ga. Laws 1985, p. 698 at 699. The Georgia legislature was specifically aware at that particular time of the pendency of this action and other related class actions and provided therein, OCGA § 10-1-36.1(b), Ga. Laws 1985, p. 698 at 699:

> Nothing contained in this Code Section shall apply to class actions involving mobile homes or manufactured homes pending in any court of this state, including United States Courts, on February 22, 1985, as to the parties to and subject matter then before such court.

The legislative history in Georgia, scant as it may be, supports the contention that the Georgia General Assembly knew specifically of these class actions and had no intention of passing any statute that would be given any retroactive effect.[6]

Georgia could not have done otherwise. Looking at the plain wording of the contract itself and the GMVSFA as it existed at the time of the contract, it is obvious that the Georgia statute created private rights of a contractual nature. There is nothing that the Georgia General Assembly could do to impair these obligations of contracts. Art. 1, Sec. 10, Clause 1, United States Constitution. The GMVSFA is a comprehensive statute governing the time-price differential of "motor vehicles," and a trailer is classified as such in Georgia. Statutes governing the interpretation and enforcement of contracts are regarded as forming part of the obligation of contracts made under their aegis. *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 17, n. 14, p. 19, n. 17 (1977).

Also, if the Georgia amendments were deemed retroactive, serious due process issues would arise. *Louisville Joint Stock*

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[6]Interestingly enough, GECC's law firm was present at the time of this amendment and, in the words of one Georgia State Senator, was "walking the halls." See Appendix C of this Reply at p. 17a. Furthermore, the sponsor of said Bill in the Georgia Senate stated that it would not affect pending actions. See Appendix C at p. 13a.

Land Bank v. Radford, 295 U.S. 555 (1935). This Court has always attempted to construe a statute in such a manner that constitutional questions may be avoided. *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

CONCLUSION

For the reasons set forth in the Petition and this Reply, writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

October 7, 1982

Thomas P. Vartanian, Esq.
General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions — Repossession Notice (§ 590.4(h))

Dear Mr. Vartanian:

We are writing on behalf of the General Electric Credit Corporation ("GECC") to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below. We further request that the Bank Board publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act").

Statement of Facts — The litigation arose in the state of Arkansas out of the following facts and circumstances. The defendants in the case, on or about May 14, 1981, purchased a mobile home under a retail installment sales contract that was assigned to the plaintiff, our client. The credit sale was secured by the mobile home itself, and the rate upon which the finance charge was calculated under the contract was 17.8 percent, a rate in excess of that permitted under Arkansas state law. However, the plaintiff had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales. (12 C.F.R. § 590.4). Under DIDMCA such compliance is a prere-

quisite for the exemption of these credit transactions from state usury laws (§ 501(a)).

The defendants defaulted in payment under the contract, leaving a substantial unpaid balance outstanding. Upon default, plaintiff gave written notice 30 days prior to acceleration of the debt and repossession. This notice was given on the form and in the manner prescribed by 12 C.F.R. § 590.4(h)(2). Reference to this notice requirement was initially made in the contract in the following manner:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of the *FINANCE CHARGE* calculated by the Actuarial Method, provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

At the ensuing possessory hearing, defendant contended that the contract was usurious under Arkansas law and, therefore, unenforceable. GECC contended that the requirements of the federal preemption of state usury laws for mobile home credit sales under § 501 of DIDMCA had been met and, therefore, the contract was enforceable.

Lest the Bank Board hesitate to issue an interpretation that may influence the course of litigation on the grounds that material facts are in dispute, it should be understood that the material facts of this case were stipulated to by the parties at the hearing. There is no dispute that (1) the contract did not expressly disclose all of the facets of the borrower's right to a 30-day notice, and (2) that the 30-day notice was actually given prior to repossession. The only issue to be decided was whether GECC was required to expressly include as a term of the contract the right of the borrower to a 30-day notice in order to take advantage of the federal rate preemption under DIDMCA.

Despite the fact that the 30-day notice had been given as prescribed, the presiding judge made a preliminary finding

that a loan or mobile home credit sale does not qualify for federal preemption without an explicit contractual disclosure to the consumer of a 30-day notice of his or her right to cure default. Because the contract in this case did not explicitly detail all of the consumer's rights upon default, including the 30 day right to cure, the judge ruled that this credit sale did not qualify for the preemption of the state usury ceiling under § 501 of DIDMCA and 12 C.F.R. § 590.4(h).

Issue — Our question to the Bank Board flows from this ruling. Must a 30-day notice of default and right to cure default be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption pursuant to § 501 of DIDMCA?

ARGUMENT

Introduction — It is our belief that this question should be answered in the negative. We respectfully submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, the Bank Board's regulations or subsequent interpretations thereof that would require that "notice" of the 30-day cure requirement be contained in the credit contract. We assert, rather, that the 30-day notice provision applies only when default occurs and that any interpretation to the contrary — in the absence of an express legislative or regulatory directive requiring its inclusion — jeopardizes the enforceability of thousands of existing contracts and undermines the safety and soundness of the manufactured housing finance industry.

We also submit that the consumer in this case (as well as any similarly situated individual) neither suffered any harm nor was deprived of any benefit by not having the 30-day notice provision reflected in the credit contract. The consumer did in fact receive a notice of the right to cure. The notice was given in a timely manner on the exact form prescribed by § 590.4(h)(2). All other consumer protections required by the Bank Board were provided. Under these circumstances, the consumer would have had no greater rights or benefits had he received notice of the 30-day right to cure in the credit contract.

Text of § 501 — The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(4)(c)). That section further states that the Bank Board's regulations must include three enumerated provisions, among them, a "30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)." (Emphasis added.)

There is nothing in this statutory language which implies an affirmative requirement to have the 30-day notice reflected in the credit contract. On the contrary, the notice requirement exception applicable to abandonment and other extreme circumstances presumes that the notice is to be given exclusively at the time of default and not at the beginning of the legal relationship between the parties[1]. If Congress had intended

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[1]The result enunciated in the judge's preliminary conclusion may have been premised in part on the notion that a "loan" is either usurious or in compliance at the time of consummation. However, the concept of "loan" involves the entire transaction, from application through collection, and is not merely limited to the execution of a contract. A loan can be usurious, even though the "contract" is entirely legal. For example, assume that a precomputed interest loan is consummated at the maximum rate allowed under state law. Upon prepayment in full before maturity, state law requires that a rebate of any unearned finance charges calculated under the actuarial method is required. If unearned finance charges were rebated under the "Rule of 78's" method rather than under the actuarial method, usurious interest would be collected. Such a transaction would be usurious (1) even if the contract was silent as to the rebate method, and (2) even if the contract called for the use of an actuarial rebate. On the other hand, if an actuarial rebate is actually performed, the transaction would not be usurious, even though the contract was silent as to the rebate method. Clearly, subsequent events affect usury determinations, the terms — or lack of terms — in the contract notwithstanding.

In the contested transactions, the notice required by § 590.4(h) was provided in connection with the "loan," even though the "contract" did not expressly disclose the 30-day period. Clearly, the "loan" did "contain" the required consumer safeguards. (*See* 12 C.F.R. § 590.3(a)(2) (iii).

that notice of the 30-day right was to be given in the credit contract as well as at the time of default, it would be senseless to provide an exception for "abandonment" or "extreme circumstances," because such events could not be foreseen at the time of the signing of the contract.

The statutory language clearly indicates that before a creditor's duty to give the notice arises, default must occur. No duty would arise unless and until default occurred. However, even this duty would be excused if abandonment or other extreme circumstances occurred. Because abandonment and extreme circumstances cannot be predicted at consummation, the disclosure can only take place at a later period in time.

Conference Report — In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention whatsoever of the 30-day notice requirement. The Conference Report accompanying the Act provides that the consumer safeguards should not preempt similar state laws that are more protective of the consumer. With regard to the contested case, the state of Arkansas has no statutory requirement directing a creditor to give any type of notice upon default on a loan and thus federal law exclusively applies.

Bank Board Regulations — The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. The 30-day notice provision contained therein expands considerably the requirement stated in § 501 of the Act. In addition to a mere notice prior to commencement of repossession, the regulation prescribes a standard form for the notice which includes, most notably, a provision giving the consumer a right to cure the default within 30 days (12 C.F.R. § 590.4(h)).

The regulation states that such notice must be given prior to an exercise of the creditor's rights upon the consumer's default. There is nothing in § 590.4(h) (or the regulatory preambles to the Bank Board's rule and its subsequent amendments) that

would lead one to believe that disclosure of the notice requirement in the credit contract is either presumed, anticipated, intended, or required. We note, moreover, that the statutory exemption from the notice requirement for "abandonment" or "extreme circumstances" is reflected in the regulation. The inferences that flow from the statutory exception apply equally here. The fact that the entire provision is prefaced with the exception — "Except in the case of abandonment or other extreme circumstances . . ." — indicates that no affirmative notice or disclosure duties are placed on the creditor if the exception applies.

Section 590.4(h) also provides an additional exception that cannot be foreseen at the time of the signing of the credit contract. It provides: "The debtor is not entitled to notice of default more than twice in any one-year period." As in the case of abandonment or other extreme circumstances, it appears that because the circumstance of three defaults in a one-year period is not forseeable [sic], any contractual reference to the debtor's right to notice could not have been intended by the Bank Board.

If the specific requirement of the 30-day notice as set forth in § 590.4(h) is determined to be required in the credit contract, compliance with such an interpretation would mandate that a clause similar to the following be part of every manufactured housing credit contract that relies on the § 501 preemption. Such a clause would be so fraught with conditions and exceptions in order to adequately state the scope of the right as to make it vague and confusing to the consumer. At a minimum, it would have to include the following information:

> If the Buyer defaults in any of the terms of this contract giving rise to acceleration and repossession, the Buyer shall be given 30-days notice of the right to cure the default before Seller is permitted to exercise his right to accelerate this obligation and foreclose on the secured property; provided, however, that in the case of abandonment of the manufactured home or other extreme circum-

> stance, or in the event that the Buyer has already defaulted on two prior occasions within a one year period prior to the instant default and in connection with each such prior default Sellor [sic] has given the Buyer a notice of the right to cure the default in a manner that is in compliance with this provision, no notice shall be given.

Despite this law firm's substantial involvement in the area of manufactured housing finance, we have never encountered such an interpretation of § 590.4(h) nor a credit contract that would be in compliance with such a requirement.

An interpretation that would require a contractual clause that specifically reflects the provisions of § 590.4(h) to be included in the contract would result in an *ex post facto* requirement that would instantly expose the manufactured housing finance industry to overwhelming liability. Moreover, this burden to the industry would not be counter-balanced by a corresponding benefit to consumers. As noted above, the inclusion of a contractual clause accurately reflecting the regulatory provisions and exceptions would be so convoluted and vague that it would have little meaning to consumers[2]. Nor would the creditor be able to simplify the clause by leaving out the circumstances under which the exceptions to the notice requirement apply, because such omissions either would make the contract vague or would subject creditors to contractual requirements broader than those set out in the regulation. If a creditor were

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[2]To the extent this notice is intended to "disclose" to the consumer his rights upon default, the amount of detailed and conditioned information required to accurately inform the consumer of his rights would inject precisely the type of "informational overload" into the contract that Congress attempted to eliminate in Title VI of DIDMCA (the "Truth in Lending Simplification and Reform Act"). Moreover, an interpretation requiring such an explicit statement of the right to be included as an express term of the contract — when the disclosure provided following default clearly accomplishes all statutory objectives — erects a hypertechnical barrier to creditor compliance. Such complexity is all too reminiscent of the compliance burdens which the Truth in Lending Act and Regulation Z placed on creditors before Congress wisely enacted simplifying amendments to facilitate compliance, limit cereditor [sic] liability and prevent information overload.

to merely state that a 30-day notice is required, the creditor would be contractually bound to give such notice even under circumstances in which the Bank Board's regulations would otherwise permit the creditor to exercise rights upon default without giving notice.

We also note that when the Bank Board intended creditors to include other terms and conditions in the contract, it expressly set forth the requirements in its regulations. For example, 12 C.F.R. § 590.4(d), which requires that the debtor be permitted to prepay the loan at any time without penalty, expressly states that "[t]he right to prepay shall be disclosed in the loan contract . . . ." Subsection (e), regarding balloon payments, permits balloon payments if, *inter alia*, such payments are agreed to in writing and "the agreement sets out the amounts and due dates of each scheduled installment." The late charge provision, subsection (f), provides that "[n]o late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and the debtor." Finally, subsection (g), regarding deferral fees, states that "agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties . . ." and then sets forth the necessary elements of that agreement.

In contrast, subsection (h), which requires the 30-day notice before repossession, foreclosure or acceleration, is noticeably silent with regard to any requirement that the right be specified in the contract. This subsection merely requires that the 30-day notice be provided before repossession, forclosure [sic] or acceleration. We believe that the Bank Board's omission of any explicit requirement that the 30-day notice be a term of the contract, when it had explicitly required other consumer protections to be written into the contract (and in fact did so in the four preceding subsections of the regulation), clearly demonstrates that the Bank Board did not intend to impose a requirement that the borrower's right to a 30-day notice be a contractual term.

We request that the Bank Board clarify the ambiguity created by the Arkansas court and reaffirm its intent that such a contractual term is not required.

Conclusion — Based upon the foregoing analysis of all relevant sources of interpretation with regard to the 30-day notice requirement, we believe that:

(1) the language of the regulation and the statute do not indicate that a 30-day notice of default and right to cure default must be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption;

(2) no greater rights or benefits would inure to the benefit to [sic] consumers if such a provision were required in the contract;

(3) relying on the absence of an express requirement that such a notice be contained in the contract, the manufactured housing credit industry has consummated thousands of contracts relying upon the § 501 preemption without such a notice; and

(4) an interpretation to the effect that the statute or regulation implicitly requires such a provision in manufactured housing credit contracts would jeopardize the legality and enforceability of thousands of existing contracts, and would impose great financial liability upon the manufactured housing credit industry.

Accordingly, we request that the Bank Board issue an interpretation holding that such a contractual term is not required to qualify for the preemption pursuant to § 501 of the Act, so long as an appropriate notice (if required) is issued by the creditor to the Buyer at least 30-days prior to repossession, foreclosure or acceleration upon default and all other consumer safeguards prescribed by the regulation are provided.

We trust that the above material fully presents the issue faced by our client. If we can be of any further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/am/4033B/805
cc: Windy Samuel, Esq.
HAND DELIVERED

APPENDIX B

FEDERAL HOME LOAN BANK BOARD

December 20, 1983

John B. Long, Esq.
Nixon, Yow, Waller & Capers
1500 Georgia Railroad Bank Building
Augusta, GA 30910-2599

Dear Mr. Long:

This is response to your letter concerning the status of a letter written by Thomas P. Vartanian, former General Counsel of the Federal Home Loan Bank Board, interpreting 12 C.F.R. § 590.4(h).

The letter in question, dated October 28, 1982, which contained an interpretation of § 590.4(h) (12 C.F.R. § 590.4(h) (1982)), was an opinion of the General Counsel issued pursuant to his authority as the Chief Legal Officer of the Board. See 12 C.F.R. 500.17. The Board has not issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221.

Please let me know if I may be of further assistance.

Sincerely,

/s/ Wendy B. Samuel

WENDY B. SAMUEL
Deputy Director
Policy & Projects Division

APPENDIX C

SENATE DEBATE AND VOTE
ON HOUSE BILL 452
FEBRUARY 28, 1985

(SENATE AIDE READING CAPTION OF BILL):

HOUSE BILL No. 452 by Representatives Coleman of the 118th, Horne of the 103rd and Jackson of the 9th. "A bill to be entitled an act to amend Article 2 of Chapter 1 of Title 10 of the Official Code of Georgia, Annotated, known as the Motor Vehicle Sales Finance Act, so as to change the delinquency charge; to remove the finance charge limitations on certain loans; to provide that a claim of violation on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action" and for other purposes.

(SENATOR FROM THE 12th):
Mr. President.

(SENATE PRESIDENT):
Recognize the Senator from the 12th.

(SENATOR FROM THE 12th):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 12th):
Is this a request to agree to a house amendment?

(SENATE PRESIDENT):
It is.

(SENATOR FROM THE 12th):
Is somebody going to explain it to us?

(SENATE PRESIDENT):
They are - before I put it to a vote. Yes, recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Mr. President, House Bill 452 was a bill that raised the - set a limit on what you could finance, negotiate interest on the finance on the selling of automobiles, $5,000. Anything above $5,000 on automobiles, that the automobile dealers could finance the - uh - negotiate the interest on the balance. There was an amendment put on to - on a floor substitute or committee substitute put on that dealt with the mobile home area. There was some concern about that . . some suits that were pending. And we have tried for the last, I say, we, the House and Senate and the lawyers that's all involved, has tried to work out some language. One side tells me that they have reached an agreement; the other side says that they need a change in other words. The authors of the Bill and myself, the sponsor of the Bill in the Senate, want this substitute just like it is. We feel like, and we've got counsel from the Legislative Counsel, that says that the Bill does what it's supposed to do. There is a suit pending, I believe it's in Richmond County, Augusta, somewhere of that nature, there's a suit pending and this Bill with the Amendment that the House put on it could not possibly affect that suit. It would affect suits from thereafter. Now, I urge that you adopt the, or agree to the House Amendment to the Senate Substitute to House Bill 452.

(SENATE PRESIDENT):

The motion is . . . Recognize Senator from the 22nd.

(SENATOR FROM THE 22nd):

Thank you, Mr. President. Ladies and Gentlemen of the Senate. Everyone who's been interested in this Bill has been in agreement that it should not apply to pending litigation. Where the difference arises is simply in this. The House Amendment that we are now asked to vote on says on the first line "nothing contained in this Code Section shall apply," etc., etc. There is a difference of opinion between the lawyers and the parties that are interested in this as to whether or not that language would indeed exempt pending litigation. There is a serious doubt in my mind. It is entirely possible that the language would exempt the pending litigation. However, there is also the very

real possibility that it would not. Therefore, what we ask you to do is to appoint a conference committee and here's the only change that we would urge that the conference committee make. "Nothing contained in House Bill 452," which is this Bill, shall apply to the pending litigation. That's basically what it would say. Then everyone would be certain within any reasonable area, that it doesn't apply to pending litigation but we simply need the conference committee because we have no other procedure available to us to change the House Amendment. But in the conference committee, I think we can assure you that the only change that will be urged by the Senate is to just simply put in "House Bill 452" so there will be absolutely no doubt that this Bill does not apply to pending litigation. It's a very fair and reasonable thing for everybody to do.

(SENATOR FROM THE 22nd):
I yield, sir.

(SENATE PRESIDENT):
Recognize Senator from the 33rd.

(SENATOR FROM THE 33rd):
Mr. President, does the Senator yield?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 33rd):
Senator, you do agree that this Bill should not be killed.

(SENATOR FROM THE 22nd):
Oh, absolutely. We have no desire to kill the Bill. It should pass. It is a question of words and I agree with that but words could be critical and I think they are critical in this instance.

(SENATOR FROM THE 33rd):
All right, and Senator, you do agree that, of course, a conference committee could be appointed and the Bill could still pass in the next day or two.

(SENATOR FROM THE 22nd):

Well, I would certainly hope that. I know that it could happen and I would hope that is what would happen.

(SENATE PRESIDENT):
Recognize Senator from the 15th.

(SENATOR FROM THE 15th):
Senator.

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 15th):
Isn't it true that this Amendment that was placed on in the House reads just like this. "Nothing contained in this Code Section shall apply to class actions involving mobile homes or manufactured homes pending in any courts of this state, including any United States courts, on February 22nd, 1985, as to the parties and to the subject matter then before such court." Is that not the way that this Amendment that I'm trying to get you to agree to, reads right now?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 15th):
And what you're trying to say is that you want to take out "in this Code Section" and insert "nothing in House Bill 452." That's just a play of words that's going on.

(SENATOR FROM THE 22nd):
Well, it's not really a play on words, but yes sir, you are correct in saying that those are only the words that we propose to, that we think need to be changed in order to carry out the intent that everybody said they wanted to carry out.

(SENATOR FROM THE 15th):
Is it not further true, Senator, that we could get a conference committee appointed, and then that conference committee could never meet, and this Bill could possibly be killed by the fact that the conference committee never could agree on words? Is that not true?

(SENATOR FROM THE 22nd):
Senator, that is certainly possible. I do not think that's going to happen and I believe that with your guidance and direction and hopefully the guidance and direction of the other conferees that we will be back within a day with a Bill that we can pass.

(SENATE PRESIDENT):
Recognize Senator from the 19th and then will get to the 23rd.

(SENATOR FROM THE 19th):
Senator yield?

(SENATOR PRESIDENT):
Senator yield?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 19th):
Senator, will that be a recommendation to the conference committee to keep what the Senator from the 15th said in the Bill?

(SENATOR FROM THE 22nd):
Well, of course, that is, that is the House's position at the present time. The language that is being offered by the Senator from the 15th. If we accept the House version, that is the language we would accept, I mean that would be in the Bill, and that language, we believe, or we are really concerned, would not exempt pending litigation. Any everyone, the mobile home dealers, everyone who has been involved agree, as far as I can determine, that they want to exempt pending litigation and it's just simply a question of what language must we use to accomplish what everyone says they want to do.

(SENATOR FROM THE 19th):
Thank you.

(SENATOR FROM THE 22nd):
Thank you, Mr. President. I urge that we reject the House version and have a conference committee. Thank you.

(SENATE PRESIDENT):

Recognize Senator from the 23rd.

(SENATOR FROM THE 23rd):

Mr. President, Ladies and Gentlemen of the Senate. I just wanted to add a couple of things to what Senator Allgood said. Of course, this does affect lawyers in Augusta, Georgia who came up here and pointed out this problem to us. But it also affects about 6,000 people who have lawsuits pending in Federal Court in Augusta. These are people that are poor people who own mobile homes that don't have King and Spalding up here walking the halls representing them. These people have their suits filed. They do feel, the lawyers from Augusta do feel that these few, this little change is critical to keeping these courts, these cases alive and I don't think it's too much to ask for a conference committee to go back and just try to change this one little think on these 6,000 suits. I think they are very important to these 6,000 people. I yield.

(SENATE PRESIDENT):

Recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Senator, would you not agree that it's just good old common walking around Georgia language that "nothing contained in this Code Section shall apply to class action suits involving mobile homes or manufactured homes:". Isn't that plain, just good old Georgia language, that nothing, nothing pending would apply to it?

(SENATOR FROM THE 23rd):

Senator, that's good old, old Georgia common sense language, but in Federal Courts, they don't listen to that good old Georgia common sense language. They want it the way it's supposed to be to keep these cases alive. If there are no further questions, I yield.

(SENATE PRESIDENT):

Recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Mr. President, I move the previous question on House Bill 452 and urge that we agree to the . . .

(SENATE PRESIDENT):
Recognize Senator from the 33rd.

(SENATOR FROM THE 33rd):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 33rd):
Mr. President, is it not true that if the motion to agree fails that it would be in order for a motion to disagree and that is the only way that a conference committee could be appointed.

(SENATE PRESIDENT):
The Senator is correct except then it would have to go back to the House and they would have to insist on their Amendment and then come back over here and then we'd have a conference committee. Everyone understand that? The motion of the Senator from the 15th is for the Senate agree to the House Amendment to the Senate substitute to House Bill 452. All those who favor of that motion, rise, stand and be counted. You're right. I'm going to put it on the machine.

(SENATOR FROM THE 22nd):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 22nd):
A vote of no or defeat of this motion is necessary in order for us to even have a chance to have a conference committee. Is that not correct?

(SENATE PRESIDENT):
The motion, if it failed, then I could take the motion to disagree which would be the first step toward getting a conference committee appointed. The motion of the Senator from

the 15th is for the Senate to agree to the House Amendment to the Senate substitute House Bill 452. All those who favor that motion will vote.

(SENATE PRESIDENT):

On the motion, the ayes are 35 and the nays are 16 and the Senate has agreed to the House amendment to Senate substitute House Bill 452.

I certify that the foregoing is a correct transcript of the audio tape of the Senate debate and vote on House Bill 452, February 28, 1985.

/s/ _____
TOM WASSELL
Senate Public Information
Officer, Georgia State Senate

Nos. 85-541, 85-584 and 85-717

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN/CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
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BRUCE G. FORREST
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

A provision of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, preempts the application of state usury laws to loans secured by first liens on residences, including mobile homes. With respect to mobile home loans, the preemption provision applies only to loans that "comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(c)), which provide, inter alia, that the lender may take no action to exercise certain remedies upon a default without giving the borrower 30 days' notice and opportunity to cure. The court of appeals ruled that the loan contract in Nos. 85-541 and 85-717 contained language inconsistent with the borrower's rights under this provision and that preemption was therefore inapplicable and the Georgia usury law was applicable to this loan. The question presented is:

> Whether the court of appeals misread the Act and the Bank Board's regulations when it concluded that federal preemption of state usury laws is inapplicable to a loan contract that contains language inconsistent with the borrower's federal law right to notice and opportunity to cure defaults.

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Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 99th Cong., 1st Sess. (1985) 14

S. Rep. 96-368, 96th Cong., 2d Sess. (1979) 2, 9, 10, 16

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-541

BARCLAYSAMERICAN CREDIT, INC., PETITIONER

v.

ARTHUR QUILLER, ET AL.

No. 85-584

JACK GRANT, JR., ET AL., PETITIONERS

v.

GENERAL ELECTRIC CREDIT CORPORATION

No. 85-717

ARTHUR QUILLER, ET AL., PETITIONERS

v.

BARCLAYSAMERICAN CREDIT, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 161-163, 12 U.S.C. 1735f-7 note, was designed to attack two primary causes of a severe shortage of mortgage credit. DIDMCA provided for

phased removal of federal interest rate restrictions on deposits in federally insured financial institutions, permitting such institutions to offer competitive rates and thereby enhance the resources available for mortgage loans. See S. Rep. 96-368, 96th Cong., 2d Sess. 3-4 (1979). DIDMCA also provided for preemption of state usury limits on residential mortgage loans, permitting such institutions to charge sufficient rates to induce mortgage lending under then-prevailing conditions. § 501(a)(1), 94 Stat. 161; see S. Rep. 96-368, *supra*, at 19.[1]

Under Section 501(c) of DIDMCA (94 Stat. 162) federal preemption of state usury laws with respect to loans secured by "residential manufactured homes" (primarily mobile homes) is conditioned on compliance with certain borrower-protection requirements promulgated by the Federal Home Loan Bank Board (Bank Board):

> The provisions of subsection (a)(1) [the preemption section] shall not apply to a loan, mortgage, credit sale, or advance which is secured by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with [the] consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—
>
> (1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;

[1] Section 501(a)(1)(C)(iii) and (vi) (94 Stat. 161) adopts, with appropriate modification, the definitions of "federally related mortgage loan" and "lender" contained in Section 527(b) of the National Housing Act, 12 U.S.C. 1735f-5(b). Thus, DIDMCA's preemption extends to loans made by institutions regulated or insured by an agency of the federal government, or by any creditor, as defined in 15 U.S.C. 1602(f), "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. 1735f-5(b)(2)(A) and (D). See 12 C.F.R. 590.2.

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge * * *; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

2. Pursuant to Section 501(c) (94 Stat. 162), the Bank Board issued regulations (codified at 12 C.F.R. 590.4) governing mortgage loans secured by manufactured housing where the lender charges an interest rate that exceeds the state usury limit. As required by Section 501(c)(1) (94 Stat. 163) the regulations require that each loan contract contain certain provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees (12 C.F.R. 590.4(d), (e), (f) and (g), respectively). As required by Section 501(c)(2) (94 Stat. 163) the regulations also provide that, subject to certain exceptions, the creditor may not exercise certain remedies in the event of default unless it has given the borrower 30 days' notice (12 C.F.R. 590.4(h)(1)):

> Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against any debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days

> of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described above. The debtor is not entitled to notice of default more than twice in any one-year period.

The regulations do not require this provision to be recited in the loan contract.

3. The two cases that are the subjects of the three petitions before this Court arose from the purchase of two mobile homes in Georgia.

Nos. 85-541 and 85-717: Arthur and Lillie Mae Quiller, residents of South Carolina, purchased a mobile home in Georgia in June 1981. The price was $19,754.80 (Pet. App.11).[2] They made a cash down payment of $4,193.80 and financed the balance of $15,561 at an annual interest rate of 18.5% (*ibid.*).[3] The loan agreement is printed on a single sheet of paper labeled "(Mobile Home Only) FEDERAL PREEMPTION CONTRACT." The front of the contract, which contains the signatures and the terms specific to the transaction, recites the disclosures required by the Board's regulations. The front of the contract also contains the following language with respect to defaults (Pet. App. 12 (emphasis added)):

> DELINQUENCY CHARGE. If an installment is in default 15 days or more, the Holder may charge and collect a delinquency charge not to exceed 5% of the installment or $5, whichever is less. Upon such delinquency, Holder may, *subject to any notice of right to*

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-541.

[3] Total finance charges over the fifteen-year contract life were $31,417.40, or $7,417.40 more than would have been permitted (in the absence of federal preemption) under Georgia's statutory 10% usury limit (Pet. App. 11; 85-541 Br. in Opp. 3).

> *cure*, accelerate the unpaid balance of the contract, in which event the unpaid balance, less the rebate of * * * any unearned insurance premiums included in this transaction, is due and payable. In connection with such delinquency, acceleration, or any repossession, Holder may collect reasonable attorney's fees (15% if not prohibited by law), if referred to an attorney not a salaried employee of Holder, and court costs.

The back of the contract contains several standardized terms, including the following (Pet. App. 13 (emphasis added)):

> Time is of the essence. Holder may collect a delinquency and collection charge on each installment in default for 15 days or more in an amount not exceeding 5% of each said installment or $5, whichever is less. If Customer defaults on any obligation under this contract, or if Holder shall consider the indebtedness or the Collateral insecure, the full balance may, upon election of Holder, *without notice, subject to any notice of right to cure*, become due and payable, less the required rebate of the Finance Charge and rebate of any unearned insurance premiums included in this transaction, together with reasonable attorney's fees (15% if not prohibited by law) if this contract is referred for collection to an attorney, plus court costs.

No. 85-584: Jack and Evelyn Grant, residents of Georgia, purchased a mobile home in Georgia on February 23, 1982 (R. 10).[4] The price was $29,100. They made a cash down payment of $4,300 and financed the balance of $24,800 at an annual interest rate of 20.12%

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[4] "R." refers to the district court record in No. 85-584.

(*ibid.*).[5] The contract contained the following provision with respect to late payments (*ibid.* (emphasis added)):

> In addition to the regular installment, Buyer agrees to pay as a delinquency and collection charge on each installment in default for more than 15 days, 5% of the unpaid amount of such installment, or $5, whichever is less. In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of that part of the *FINANCE CHARGE* designated as the Time Price Differential calculated by Pro-Rata Method *provided that Buyer shall be given notice of right to cure default* before Seller is permitted to exercise that right.

4. Each couple filed suit against its lender, claiming that the interest rate in its contract exceeded the Georgia usury limit of 10%. Both couples alleged that the state-imposed interest cap was not preempted by DIDMCA because, in the words of the Quiller complaint, the contracts failed to "specifically provide for * * * thirty (30)-day notice [prior to instituting any action leading to repossession or foreclosure]" (Pet. App. M3; see R. 5-7). Both couples sought declaratory judgments barring the lenders from collecting any finance charges. In addition, the Quillers sought penalties of $62,834.80 and the Grants sought $115,092.00 (double the total finance charges) for "willful" violations of state law. Each case was filed as a class action on behalf of persons who had financed purchases of mobile homes with the defendant in Georgia at a rate exceeding the state's usury limit and whose contracts

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[5] Total finance charges over the fifteen-year contract life were $57,546, or $9,996.99 more than would have been permitted under the Georgia statute in the absence of federal preemption (see 85-584 Pet. 3; R. 10).

"did not specify that the purchasers were entitled to a thirty (30) day notice prior to instituting any action leading to repossession or foreclosure" (Pet. App. M2; see R. 3-4).

5. The United States District Court for the Southern District of Georgia granted motions to dismiss both complaints for failure to state a claim.[6] Separate appeals in the two cases were heard by the same panel of the United States Court of Appeals for the Eleventh Circuit. A divided panel reversed in both cases.

All members of the panel agreed that neither the statute nor the regulations required that the borrower's federal right to notice be recited in the contract (Pet. App. B5-B7). However, the majority concluded in *Quiller* that if a contract does contain language that "permits the creditor to repossess or foreclose * * * upon default," then DIDMCA is violated and "the creditor cannot claim the benefits of * * * preemption" (*id.* at B7). The majority examined the Quiller contract "through the eyes of the typical consumer" (*ibid.*) and held that certain language on the back of the contract[7] (" 'without notice, subject to any notice of right to cure' ") was contrary to the statute and regulations because it "would, at most, inform the debtor that he *may* have a right to cure, but the law guarantees him an *absolute* right to cure" (*id.* at B8 (emphasis in original)). The court held that therefore the terms and conditions of the loan did not comply with the federal requirements and the loan was not entitled to preemption.

In *Grant*, the same divided panel found that the contractual language at issue in that case (stating that the lenders may declare all installments "immediately" due

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[6] The *Quiller* case was originally filed in state court and was removed to federal court by the defendant. The *Grant* case was filed initially in the federal court as a diversity action.

[7] The court did not mention the language on the front of the contract, *i.e.*, "subject to any notice of right to cure."

and payable " 'provided that Buyer shall be given notice of right to cure default' ") was "directly contrary" to the Act and the Board's regulations (Pet. App. E3 (citation omitted)). Accordingly, as in *Quiller*, the panel reversed the district court's judgment on the pleadings.

6. Both cases were then reheard en banc. By a vote of six to five, the court reinstated without change the panel opinion in *Quiller*, which found a violation of the statute. But in *Grant* the court split eight to three the other way, finding no violation. The majority opinion in *Grant* explained the different results in the two cases by noting that the Grant contract "expressly condition[s]" the right to accelerate upon default "in clear, mandatory terms upon the debtor's receipt of notice of right to cure" (Pet. App. D9). Although, as the court acknowledged, the length of the grace period was not stated in the contract, the majority concluded that the Grant contractual language was "not clearly contrary to the requirements of the statute and regulations" (Pet. App. D2, D4).

Both decisions evoked strong dissents. In *Quiller*, the dissenting judges stated that the contract did not conflict with the Act or the regulations since the right to notice is not "absolute." The dissenting judges also suggested that if the contract misstated the federal requirement "a more equitable remedy might be to invalidate the provisions contrary to federal law and enjoin enforcement of such provisions if necessary to protect the consumer" (Pet. App. A6). In *Grant*, the dissenting judges on the en banc court would have found a violation even though the contract was "not as vague or equivocal as the qualifying clause in the *Quiller* contract" (Pet. App. D11).

DISCUSSION

The court of appeals has misconstrued Section 501(c)(2) of DIDMCA and 12 C.F.R. 590.4(h)(1). Section 501(c)(2) directs the Bank Board to adopt a regulation requiring

creditors to give 30 days' notice under certain circumstances. The Bank Board obeyed this direction: 12 C.F.R 590.4(h)(1) provides that, with certain exceptions, a creditor may not exercise certain remedies under a loan contract enjoying federal preemption unless it has given the borrower 30 days' notice. This regulation is self-enforcing: it does not require that the borrower's federal right to notice be set forth in the contract, and any language in the contract that is inconsistent with the borrower's federal right to notice is invalid and unenforceable. Congress and the Bank Board did not intend, nor is it logical, that such inconsistent language should result in loss of preemption.

The holdings in these cases erroneously cast doubt on the validity of a large amount of manufactured housing credit extended under DIDMCA. The impact will be felt by lender institutions and other present holders of such credit, many of which are federally insured. Moreover, because the doubt is one that cannot be resolved on the face of the instruments but would require judicial construction of each allegedly inconsistent phrase, the approach taken below will introduce unnecessary confusion into the secondary markets for such loans. Accordingly, and although the potential economic impact of these decisions cannot be quantified with precision, we believe that review by this Court is warranted.

1. Congress enacted DIDMCA to remedy the severe shortage of mortgage credit that had resulted from rising interest rates. See. S. Rep. 96-368, *supra,* at 3-4. One of the problems was that depository institutions were inhibited from making mortgage loans in states whose usury laws prevented them from charging a market rate of interest. Congress concluded that a statutory "modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national

secondary market in mortgage lending." S. Rep. 96-368, *supra*, at 19.[8] As the Senate report explained (*ibid.*):

> Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.

Section 501(c) of DIDMCA provides that the preemption provision shall not apply to a loan unless its terms and conditions "comply with consumer protection provisions [to be] specified in regulations" of the Bank Board. The statute contemplates regulations of two types: regulations requiring certain provisions to be set forth in each contract and regulations imposing self-enforcing requirements and prohibitions. Neither type of regulation would create any doubt about the validity of a loan contract that could not be resolved by examining the face of the contract.[9]

Section 501(c)(2) permits the Bank Board to adopt a regulation with respect to notice that is of the self-enforcing type: it provides that the regulations shall "re-

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[8] As a practical matter, prior to DIDMCA borrowers like the plaintiffs found it difficult or impossible to obtain any home financing. See, S. Rep. 96-368, *supra*, at 19; see also 6A A. Corbin, *Corbin on Contracts* § 1498, at 678 (1962) (usury laws "deprive those whose credit is weakest of the opportunity to borrow at all").

For this reason, the court of appeals erred in viewing expanded consumer protection measures as the "price" lenders must pay for the right to charge higher interest rates (Pet. App. B9). The new right of lenders to charge market interest rates benefited both lenders and borrowers by making credit available.

[9] This was important to Congress, which did not want the consumer protection provisions to defeat the primary purpose of making credit more readily available. For example, the conference report states, "before exercising this authority [to prescribe additional protections], the Board should carefully * * * study the implications of each additional requirement, including consideration of the economic impact on creditors and consumers of each requirement." H.R. Conf. Rep. 96-842, 96th Cong., 2d Sess. 79-80 (1980).

quire a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances)." Accordingly, 12 C.F.R. 590.4(h)(1) is a self-enforcing prohibition against acceleration or foreclosure without 30 days' notice except under specified circumstances. The regulation does not require that the right to notice be set forth in the loan contract,[10] and the Board has consistently adhered to the view that the regulation does not require manufactured housing loan agreements to include a provision for 30 days' notice in the event of default. See Pet. App. J1-J2 (opinion of Bank Board's general counsel); *id.* at K1-K8, L1-L9 (Bank Board amicus curiae briefs in court of appeals).

2. The court of appeals recognized that the right to notice need not be set forth in the loan contract (Pet. App. B5 (emphasis in original)):

> The plain language of the regulation prohibits only the *act* of foreclosure or repossession without giving notice. The words "no action . . . may be taken" regulate the conduct of creditors attempting to exercise their rights upon default, not the written financing agreements themselves.

But the court then ruled that if the contract does contain remedies language that a court finds contrary to the borrower's federal right to notice, preemption is lost. The court apparently assumed that the loan contract could "authoriz[e] conduct contrary to" federal law. Pet. App. B7 (emphasis omitted). On that assumption, the court examined the language in each contract to see whether it

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[10] By contrast, the regulations do require certain consumer protection provisions to be set forth in the loan contract. See 12 C.F.R. 590.4(d), (e), (f) and (g). Any failure to comply with these disclosure rules is discernible on the face of the contract and results in loss of preemption.

"authorized" contrary conduct. It concluded that the loan contract in *Quiller* gave the lender rights contrary to the regulations, defeating preemption.

The court of appeals apparently failed to recognize that the Act and the regulations set forth a federal 30-day notice requirement that the lender and borrower have no power to nullify. Obligations "imposed by law, as necessary to the public interests, * * * could not be dispensed with by the agreement of the parties." *Chicago, St. L. & N.O.R.R.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 90 (1891). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 692 (1897). Any misstatement in a loan contract is simply unenforceable. As this Court recently stated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 12, "[i]f the regulatory statute is otherwise within the powers of Congress * * *, its application may not be defeated by private contractual provisions."

Accordingly, if the loan contract in *Quiller* misstated the borrower's right to notice,[11] the misstatement did not reduce the borrower's rights that arise by force of the regulation if the lender has elected to preempt state usury law. Preemption is not, in this respect, dependent on the language of the contract, and an arguable misstatement of a right the borrowers might have under certain circumstances in the future did not entitle the borrowers to

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[11] The court of appeals' conclusion that the Quiller contract purported to authorize conduct contrary to federal law is itself highly questionable. That conclusion was based on the contract's departure from what the court perceived as the statute's "*absolute* right to cure" (Pet. App. B8 (emphasis in original)). As the Bank Board advised the court (Pet. App. L14), however, the notice requirement is not absolute. The Act and the regulations expressly contemplate situations in which notice need not precede the remedies for default (*i.e.*, abandonment, extreme circumstances, or the third default within a year).

the windfall of a reinstatement of the usury statute after they had received the loan they bargained for and the protection of the federal notice requirement.[12]

3. The court of appeals' ruling casts doubt on the enforceability of a large quantity of outstanding manufactured housing loans. Moreover, such doubts cannot be resolved by examining the face of the contracts but will require an assessment in each instance of the risk that a court will later find language in the contract inconsistent with the notice requirement of the federal regulation. (This assessment may, as illustrated by the range of views below, be difficult to make.) The court of appeals' approach would therefore tend to reduce the marketability of all such loans, contrary to the central purpose of DIDMCA to encourage a flow of capital into home loans.

While few loans at rates in excess of state usury limits are being written today, there is a large number of outstanding loans that this en banc decision wrongly places under a cloud. In 1985, the amount of outstanding credit extended for mobile home purchases stood at almost $26 billion. *Domestic Financial Statistics*, 72 Fed. Res. Bull. A40 (1986). Part of that sum is attributable to loans not dependent on federal preemption: loans that preceded DIDMCA; loans made in the 14 states that had no usury

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[12] The brief in opposition in No. 85-541 makes several references (at 5-6, 9-11) to conduct that, respondents contend, would divest the lender of the protections of federal preemption without regard to the contractual language. The complaint makes no such claim, however, and is directed exclusively to the language of the loan agreement. Accordingly, respondents' contentions of unlawful conduct have no bearing on the issue before this Court. The district court proceedings in this case terminated when the lender's motion to dismiss the complaint for failure to state a claim was granted. In that posture, only the allegations of the complaint (*i.e.*, the contract's purported shortcomings in disclosure) are considered. The court of appeals therefore did not comment on the conduct allegations and they are not properly before this Court.

limits or had limits higher than market rates;[13] and loans made recently at lower interest rates. In addition, between 1980 and 1983 fifteen states implemented DIDMCA's provision for opting out of the federal usury preemption and returning to state-imposed usury standards.[14] In those states, therefore, DIDMCA provided the basis for lending only until the effective date of each state's override legislation. In addition, eight other states have eliminated usury limits for some or all manufactured home loans.[15] Some

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[13] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 1st Sess. 220 (1985).

[14] Under DIDMCA § 501(a)(2) (94 Stat. 162) states were given the opportunity, until April 1, 1983, to override the preemptive provisions of the Act. The following states did so (the effective dates of the override laws are noted in parentheses): Colo. Rev. Stat. § 5-13-105 (Supp. 1985) (July 1, 1981); Ga. Code Ann. § 7-4-20 (Supp. 1985) (Mar. 31, 1983); Hawaii Rev. Stat. § 478-12 (Supp. 1984) (May 30, 1980); Ida[illegible] Code § 28-49-105 (Supp. 1985) (Mar. 31, 1983); 1980 Iowa Acts ch. 1156, § 32 (May 9, 1980); Kan. Stat. Ann. § 16-207a (1981) (May 17, 1980); Me. Rev. Stat. Ann. tit. 9-A, § 1-110 (Supp. 1985) (May 18, 1983); 1981 Mass. Acts ch. 231, § 2 (Sept. 2, 1981); Minn. Stat. Ann. § 47.203 (West Supp. 1986) (June 2, 1981); 1982 Neb. Laws L.B. 623 (July 17, 1982); 1981 Nev. Stat. ch. 668, § 11 (June 14, 1981); N.C. Gen. Stat. § 24-2.3 (Supp. 1985) (Mar. 31, 1983); 1981 S.C. Acts No. 6 (Mar. 2, 1981); 1982 S.C. Acts No. 385; S.D. Codified Laws Ann. § 54-3-15 (Supp. 1984) (Mar. 5, 1981); 1981 Wis. Laws ch. 45, § 50 (Nov. 1, 1981).

[15] See Ariz. Rev. Stat. Ann. §§ 44-1201(A), 44-6002 (Supp. 1985); Cal. Health & Safety Code § 18039.5 (West 1984); Mont. Code Ann. § 31-1-241(1) (1985); N.H. Rev. Stat. Ann. § 361-A:8 (1984); N.M. Stat. Ann. § 56-8-11.1 (Supp. 1985); Or. Rev. Stat. § 82.010 (1985); Utah Code Ann. §§ 15-1-1, 70C-2-101 (Supp. 1985); Va. Code §§ 6.1-330.37, 6.1-330.21 (1983); *id.* §§ 46.1-515 *et seq.* (1980 & Supp. 1985). In other states, there are no interest limits for certain types of loans, but it is unclear from the statutes whether loans for the purchase of mobile homes fall within those provisions. *E.g.*, Ala. Code § 8-8-5 (1984); Alaska Stat. § 45.45.010(b) (Supp. 1985) (no limit for

of the remaining states adjusted their interest rate ceilings upward to reflect market conditions, so that as a practical matter Section 501 became progressively less significant in stimulating loans.[16] Nevertheless, the Bank Board estimates that of the $26 billion in outstanding credit secured by mobile homes, at least $4 billion is dependent on federal preemption.

The court of appeals' ruling would make the enforceability of these loans not only uncertain but dependent in many instances on judicial construction of language alleged to be inconsistent with the notice regulation. The decision will, in the Bank Board's view, have a direct effect on the secondary market for such mortgage loans (and securities backed thereby).[17] This is a market in which

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loans over $25,000); Conn. Gen. Stat. Ann. § 37-9 (West Supp. 1985) (no limit for loans extended by certain financial institutions); Del. Code Ann. tit. 5, § 2907 (Supp. 1985) (motor vehicle financing); Ill. Ann. Stat. ch. 17, § 6404 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. Ann. § 360.150(2) and (13) (Bobbs-Merrill Supp. 1984); *id.* § 360.010(1)(b); N.J. Stat. Ann. § 17:16C-41 (West 1984); N.Y. Pers. Prop. Law § 404(1) (McKinney Supp. 1986) (retail installment sales); Wyo. Stat. § 40-14-212 (Supp. 1985) (no limit over $25,000); *id.* § 40-14-348 (no limit over $25,000).

[16] Market interest rates are at present below the usury limits in virtually all states; there is, accordingly, no substantial reliance on federal preemption at this time. Market conditions are not static and could of course alter that situation.

[17] Because the court of appeals' decision in *Quiller* is interlocutory, the direct impact of the decision on the parties is unknown. The plaintiffs contend that under the state law in effect at the time the suit was commenced (Ga. Code Ann. §§ 10-1-30 *et seq.* (1982)), the penalty for wilful excessive interest rates was forfeiture of the entire finance charge ($31,417.40) plus twice that amount as a penalty. The Georgia law has since been amended, however. In 1983, Georgia repealed all interest rate limitations on motor vehicle loans, including mobile homes (Ga. Code Ann. §§ 7-4-3, 7-4-5 (Supp. 1985)). Under the new law, violations of disclosure provisions will result in damage awards no smaller than $100 and no greater than $1,000. Recent Georgia Supreme Court decisions strongly suggest that the state would

Congress expressly sought to ensure stability (see S. Rep. 96-368, *supra*, at 19 ("it is the Committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section")). We therefore suggest that, notwithstanding the absence of a conflict among the circuits, this Court should put an early end to the potential dislocation that could be caused by the decision below by reviewing the question whether preemption can be defeated by contract language that does not accurately state the borrower's federal right to notice.[18]

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apply these amendments to the instant case. See *Ward* v. *Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729, 730-731 (1985); *Fountain* v. *Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906, 907-908 (1984); see *Ehrman* v. *Manning*, 177 Ga. App. 442, 339 S.E.2d 652 (1986). One federal district court decision that preceded *Ward*, however, indicates that the matter is not free from doubt. *Doyle* v. *Southern Guaranty Corp.*, No. CV 184-180 (S.D. Ga. Jan. 15, 1985).

The interlocutory posture of the *Quiller* case need not deter this Court's review. The important federal statutory issue has been resolved with finality for purposes of the case. Unless it is reversed, the decision below will control all further proceedings in *Quiller* and will govern the decisions in the related cases currently pending in the Eleventh Circuit (see 85-541 Pet. 8 n.4).

[18] That is the essence of the second question presented in No. 85-541, the only question in the three petitions that merits a grant of certiorari. The first question in No. 85-541 turns on the particular language in the Quiller-Barclays contract and is of little consequence other than to the parties. The same is true of question two in No. 85-584. The remaining questions in Nos. 85-584 and 85-717 would be resolved by a decision in No. 85-541. Accordingly, if certiorari is granted on question two in No. 85-541, the other cases should be held pending this Court's disposition. Should the petition in No. 85-541 be denied, however, then the companion petitions should also be denied.

CONCLUSION

The petition for a writ of certiorari in No. 85-541 should be granted with respect to the second question presented and the petitions in Nos. 85-584 and 85-717 should be disposed of in light of this Court's disposition in No. 85-541.

Respectfully submitted.

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No. 85-584

In the Supreme Court of the United States

October Term, 1985

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,
Petitioners,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT GENERAL ELECTRIC CREDIT CORPORATION IN OPPOSITION TO PETITION

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No. 85-584

In the Supreme Court of the United States

October Term, 1985

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,

Petitioners,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT GENERAL ELECTRIC CREDIT CORPORATION IN OPPOSITION TO PETITION

Respondent General Electric Credit Corporation ("GECC")[1] respectfully files this Supplemental Brief in Opposition to Petition pursuant to Rule 22.6 of the Rules of this Court to address issues raised by the Brief of the United States as Amicus Curiae.

1. The listing of the parent companies, subsidiaries, and affiliates of GECC as required by Rule 28 of the Rules of this Court is included as an appendix to the Brief of Respondent General Electric Credit Corporation in Opposition to Petition.

THE PETITION IN THIS CASE AND THOSE IN NOS. 85-541 AND 85-717 SHOULD BE DENIED.

The United States has recommended that this Court review only the second question presented in *Barclays American/Credit, Inc. v. Quiller* ("Quiller"), No. 85-541. The United States does not recommend that certiorari be granted in either the instant case ("*Grant*") or in the plaintiff's cross petition in *Quiller*, No. 85-717, but recommends that these petitions should be held and disposed of in light of the *Quiller* petition, No. 85-541. Although GECC agrees that the result reached by the court of appeals in *Quiller* was incorrect, the second issue raised in the *Quiller* petition does not present a question worthy of review on certiorari at this time. All three petitions should be denied.

A. The Petitions Do Not Present a Constitutional Issue, a Split in the Circuits, or an Issue of National Importance and General Application.

The second question presented in the *Quiller* petition, to wit, whether the court of appeals erred in concluding that federal preemption of state usury laws is not available if a mobile home credit contract contains language inconsistent with the debtor's federal right to notice and opportunity to cure defaults, does not satisfy *any* of the considerations generally governing review on certiorari as stated in Rule 17 of the Rules of this Court. The question does not raise a constitutional issue. It is not an issue upon which there is a split in the circuits. In its present posture, it is not an important question of federal law of sufficiently general application to warrant this Court's review at this time.

As the Brief of the United States recognizes, few mobile home credit contracts are presently being written in reliance on the preemption of state usury limits created by § 501(c) of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), 12 U.S.C. § 1735f-7 note. (Brief of the United States at 13). Falling interest rates and changes in state usury laws have reduced the need for preemption of state usury laws in order to make mortgage funds available. Indeed, DIDMCA no longer has any application to mobile home credit transactions in Georgia or in the fourteen other states that have opted out of DIDMCA. (Brief of the United States at 14).

A decision by this Court in *Quiller*, No. 85-541, would therefore be relevant only to that existing pool of outstanding mobile home credit contracts that do not satisfy the Eleventh Circuit's affirmative misrepresentation test relating to contractual descriptions of the right to notice of right to cure default. This standard does not put all mobile home credit contracts that rely on preemption in jeopardy.

There has been no flood of litigation on this subject. Rather, virtually all of the pending litigation can be attributed to one group of attorneys from Augusta, Georgia. The pending scope of litigation does not warrant consideration by this Court.

B. The Issues Presented in the Quiller Petition Are Not Ripe.

The issues presented in the *Quiller* petition, No. 85-541, are not ripe for review by this Court. Developing Georgia case authority strongly indicates that statutory amendments eliminating the state law penalties that plaintiffs seek to enforce would be applied to the *Quiller* case.

See Ward v. Hudco Loan Co., 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Ehrman v. Manning*, 177 Ga. App. 442, 339 S.E.2d 652 (1986); O.C.G.A. § 7-4-3, § 7-4-5 (Michie Supp. 1985).[2] Further, neither the district court nor the court of appeals addressed the potentially dispositive statute of limitations issue. Resolution of these questions on remand in *Quiller* could moot all issues and obviate the need to resolve the federal issues presented.

Finally, Supreme Court review of these questions is not necessary to establish a more definite national standard for preemption. Both Congress and the Federal Home Loan Bank Board are considering amendments which could limit the applicability of any Supreme Court ruling in this area.

C. Disposition of the Petition in Grant Should Not Be Deferred Until the Merits of the Quiller Petition Are Resolved.

The petition in *Grant* does not turn on the disposition of the question recommended for review by the United States in the *Quiller* petition, No. 85-541. Acceptance of the United States' position that preemption is not defeated by an inaccurate contractual description of the federal right to notice and opportunity to cure defaults would require that the judgment below in *Grant* be affirmed. Alternatively, a conclusion that contractual language inconsistent with the debtor's federal law of right to notice and opportunity to cure defaults could result in a loss of preemption would not affect the result in *Grant*. The en

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2. This issue is pending and open in the Eleventh Circuit in *Moyer v. Citicorp Homeowners, Inc.*, No. 84-8166 (11th Cir. filed Feb. 27, 1984). Citicorp has moved the Eleventh Circuit to certify this issue to the Georgia Supreme Court.

banc Eleventh Circuit reviewed the specific language of the GECC contract and properly concluded that the GECC contract, "in mandatory terms, unambiguously informs the debtor that he or she 'shall be given notice of right to cure default' before 'seller is permitted' to exercise its right to accelerate." *Grant v. General Electric Credit Corp.*, 764 F.2d 1404, 1406 (11th Cir. 1985) (en banc). In light of this conclusion of the en banc court of appeals, there is no reason to hold the GECC contracts in limbo in the event that this Court reviews the question presented by the United States.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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Nos. 85-541, 85-584 and 85-717

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC., *Petitioner*,
v.

ARTHUR QUILLER, *et al.*, *Respondents*.

JACK GRANT, JR., *et al.*, *Petitioners*
v.

GENERAL ELECTRIC CREDIT CORPORATION, *Respondent*.

ARTHUR QUILLER, *et al.*, *Petitioners*,
v.

BARCLAYSAMERICAN/CREDIT, INC., *Respondent*.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. The Depository Institutions Deregulation And Monetary Control Act Of 1980 Was Not An Absolute Preemption Statute.

The fallacy of the position of the United States that the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) only governs conduct subsequent to the time of a transaction is two-fold: (1) it ignores the language of DIDMCA and (2) it ignores the fact that DIDMCA was not an absolute preemption statute that preempted all state laws governing the finance charges that could be assessed on mobile home credit sale transactions and loan transactions.[1]

For example, let the following be answered: would a lender, which elected not to pay the price for preemption and which did not charge finance charges in excess of applicable state law be subject to a suit

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[1] The United States erroneously refers to the term "usury," a term which relates to the charging of excessive interest on loans. *See Phillips v. Allis-Chalmers Credit Corp.*, 177 Ga.App. 323, 339 S.E.2d 302, 303 (1985). The *Quiller* transaction and the *Grant* transaction, like most mobile home credit transactions, involve a "time-price sale" arranged by dealers who in turn discounted the mobile home contracts to finance companies. Transactions such as this are generally governed by comprehensive state retail installment sales acts. In this case, both the *Quiller* and *Grant* transactions were governed by the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30, et seq. Credit is prearranged between the dealer and finance company and financing is generally tied to the trailer. The financing market is captive as opposed to the financing of conventional homes which are generally financed by loans from third parties. Contrary to the implications made by the United States in Note 17, the rights of the Quillers and Grants under this statute are contractual obligations which cannot be abrogated by subsequent amendments to Georgia statutes.

enjoining conduct inconsistent with DIDMCA and the consumer protection regulations promulgated thereunder when it computed finance charges pursuant to the Rule of 78s, when it assessed late charges after only 10 days, when it immediately and without notice accelerated the payments or when it immediately and without notice repossessed a mobile home or foreclosed a security interest? The answer is absolutely NO!

The United States, on p.11, Note 10, admits that any failure to comply with 12 C.F.R. § 590.4(d)(e)(f) and (g) which is discernable on the face of the contract would result in loss of preemption. Those regulations govern balloon payments, prepayment penalties, late charges and deferral fees. Those regulations were enacted in order to comply with DIDMCA § 501(c)(1). DIDMCA, § 501(c)(2) mandates the notice of default and the right to 30 days in which to cure the default. These are even more important protections. Both these sub sections are exactly coordinate and are, in fact, part of the same sentence of DIDMCA which referred unmistakably to the content or the "terms and conditions" of the credit sale contract. There is not even a whisper in DIDMCA about any "self-enforcing" provisions.

The mobile home finance industry, in urging Congress to enact the mobile home section of DIDMCA, told Congress that credit sales utilizing the "Rule of 78s" and credit sales "failing to incorporate appropriate purchaser protections drawn from the traditional real estate mortgage field" would not be entitled to the preemption of state laws governing

finance charges.[2] The traditional real estate mortgage field has long utilized uniform promissory note forms and mortgage forms that have been approved by the Federal Home Loan Mortgage Corporation (FHLMC) and by the Federal National Mortgage Association (FNMA). These forms that are utilized nationwide contain a contractual right to a notice of default and a contractual right to 30 days in which to cure the default.[3]

Section 501(c) of DIDMCA was consistent with what was requested by the mobile home finance industry; that is, a limited preemption of state laws that only applied to certain "federally related mortgage lenders" who drafted contracts with "terms and conditions" that complied with DIDMCA and the consumer protection regulations enacted by the Federal Home Loan Bank Board (FHLBB). While granting the FHLBB broad discretion in formulating these consumer protection regulations, Congress specifically required that in connection with preemption transactions, mobile home purchasers would have as a "term and condition" of their contract a right to a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases of abandonment or extreme circumstances), a provision consistent with the contractual provisions

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[2] *Mobile Home Usury Preemptions: Hearing Before the Subcomm. on Financial Institutions and Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, S.Hrg. 99-1382 (hereinafter referred to as 1985 Senate Hearings), p.207-208, testimony presented by Mr. Will Ehrle on behalf of the Coordinating Counsel on Manufactured Housing Finance, February 21, 1980, and appearing in this November, 1985 testimony.

[3] Case No. 85-541, Quiller Appendix N, p.58a.

contained in traditional real estate mortgage documents. DIDMCA § 501(c)(2).

At the time the consumer protection regulations were proposed and adopted, the FHLBB's position was clear that creditors would be entitled to preempt state law only if their contracts were consistent with those regulations. 45 Fed.Reg. 31122 (May 12, 1980); 45 Fed.Reg. 43681 (June 30, 1980). Thus, both Congress and the FHLBB understood at the time of the enactment of DIDMCA and the adoption of the consumer protection regulations that creditors would not be entitled to preempt state laws governing finance charges if consumers were not granted a right to a notice of default and a right to cure that default within 30 days prior to repossession or foreclosure. It was also the obvious intent of both that if the "terms and conditions" of the mobile home contract contained language inconsistent and antagonistic with the requirements of the consumer protection regulations contained at 12 C.F.R. § 590.4, the contract did not preempt state law. Creditors whose contracts did not comply with DIDMCA, § 501(c), and 12 C.F.R. § 590.4 did not lose any preemption; they merely never qualified for it in the first instance.

II. DIDMCA, § 501(c) Requires That In Order For Contracts To Be Entitled To Preemption, Consumers Be Granted A Contractual Right To Notice Of Default And A Contractual Right To Cure That Default Within 30 Days.

While Congress granted broad authority to the FHLBB to promulgate consumer protection regulations, it mandated that consumers be given a notice of default and 30 days in which to cure the default prior to repossession or foreclosure (except in cases

of abandonment or extreme circumstances). DIDMCA, § 501(c)(2). Under the Uniform Commercial Code, a creditor is entitled to peaceably repossess a mobile home immediately and without notice unless the creditor's right is modified by contract. *Ford Motor Credit Company v. Hunt*, 241 Ga. 342, 245 S.E.2d 295 (1978); U.C.C. Art. 9, § 503. The only way the consumer is going to have the right to notice of default and the right to cure that default within 30 days is for that right to exist by virtue of the terms and conditions of the contract. If the contract is silent on the subject, the debtor is subject to U.C.C. Art. 9, § 503.[4]

The United States argues that obligations imposed by law could not be dispensed with by agreement of the parties. However, that argument presupposes that all mobile home credit sale contracts had been preempted by DIDMCA. The only way to determine whether or not a contract is governed by state law

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[4] The United States correctly points out that the Eleventh Circuit Court of Appeals rejected this argument. However, in doing so, the Court relied heavily on the "Vartanian" letter. Between the date of the panel opinion and *en banc* briefing, this letter was exposed for exactly what it was, an unofficial opinion solicited *ex parte* at the request of General Electric Credit Corporation in order to defeat litigation pending in the state courts of Arkansas. No efforts were made to "publish" or "promulgate" this unofficial letter until after the requesting party determined that it was beneficial to it. If letters such as the "Vartanian" letter can determine issues such as those being presented here, then issues such as this will be decided depending upon what party in litigation has the most clout with a particular governmental agency. As the Federal Register does not contain any proposed amendment to the regulations, evidently this process continues. See page 4 of the Supplemental Brief filed by General Electric Credit Corporation in Opposition to Petition.

or whether or not the lender has paid the price for preemption is to review the "terms and conditions" of the contract. Otherwise, creditors do exactly as was done in the *Quiller* case, that is, they argue that the contract is governed by some other statute.[5]

Mobile home contracts such as those used in the *Grant* and *Quiller* cases are typical contracts of adhesion. Purchasers are frequently unaware of complicated rules of contract construction and such contracts should be construed through the eyes of the typical consumer to determine whether or not the finance company used terms and conditions to impose illegal burdens upon the consumer. *See* Rakoff, *Contracts of Adhesion*, 96 Harv.L.R. 1174 (1983).

III. The Eleventh Circuit Court Of Appeals' Ruling In *Quiller* Does Not Cast Doubt On The Enforceability Of Large Quantities Of Outstanding Mobile Home Transactions.

The United States, like certain mobile home finance companies who have appealed to Congress for retroactive pardons, has been unable to offer any specific figures to support its "sky is falling" arguments. However, numerous finance companies and lenders, in drafting their contracts, have paid specific attention to the "price for preemption" and have specifically granted as a term of the contract the right to notice of default and a contractual right to cure that

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[5] The United States argues in fn.12 that based on the language of the complaint, the *in judicio* admissions in the pleadings by BarclaysAmerican, as well as the *in judicio* admissions concerning the conduct of BarclaysAmerican are irrelevant since the district court dismissed this case on a FRCP 12(b)(6) motion. This argument ignores notice pleading under the Federal Rules of Civil Procedure. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

default within 30 days, and have insured that the other terms and provisions were consistent with those consumer protections contained in DIDMCA § 501(c) and in 12 C.F.R. § 590.4.[6] In answering questions posed by the Senate, trade organizations representing BarclaysAmerican produced a copy of the current form contract used by BarclaysAmerican, which specifically grants consumers a contractual right of notice of default and a contractual right to cure that default within 30 days, and which has other terms and conditions which are consistent with DIDMCA and the consumer protection regulations contained at 12 C.F.R. § 590.4.[7] The fact of the matter is that only a few finance companies are known to have charged finance charges in excess of those permitted by state law while not paying the price for preemption. These finance companies, whose contracts are in violation of state law, are subject to the remedies provided by state law and arguments concerning the economic consequences to either party are irrelevant and *de hors* the record.

CONCLUSION

Adherence to the statutory language of DIDMCA demands that the "terms and conditions" of the credit sale contract be considered in determining whether or not state law has been preempted.[8] The United States has ignored this principle for purposes of ex-

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[6] 1985 Senate Hearings, *supra*, p.20, p.51-52, 53-54, 55-56.

[7] *Id.*, p.270-271.

[8] *See Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. ___, 88 L.Ed.2d 691 (1986).

pediency and for perceived economic considerations. A position like that taken by the United States would give credence to the legal philosophy "that the law is no more than a means by which unjust power relations are dressed in the costume of external truths."[9]

The issues in No. 85-584 involve important questions of federal law which have, in part, been emasculated and obscured by unofficial opinions and varying positions of the FHLBB obtained *ex parte* in an effort to support certain arguments contrary to the clear and unambiguous language of DIDMCA. This Court should decide these issues and grant the petition for writ of certiorari in No. 85-584. The petition in No. 85-717 should be granted only if this Court grants the petition in No. 85-541.

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[9] *Time*, Nov. 18, 1985, p.87. *The New York Times*, Oct. 6, 1985, p.58, discussing Critical Legal Studies.

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